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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 303

ARTHUR HOFFMAN,
Petitioner,
Against
CHRYSLER CORPORATION, ET AL., and
PAUL C. ACKERMAN, ET AL.,
Respondents, Defendants below,
and
SOL A. DANN, ET AL., and MARY L. GALLO, ET AL.,
Respondents, Plaintiffs below,
and
ERWIN H. EZZES, HERMAN KOENIGSBERG and
VIRGINIA S. JUDSON, et al.,
Respondents, Objectors below.

* * * * * * * *

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

BRIEF OF CERTAIN DEFENDANTS BELOW, RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 893

ARTHUR HOFFMAN, *Petitioner,* *Against* CHRYSLER CORPORATION, *et al.*, and PAUL C. ACKERMAN, *et al.*, *Respondents, Defendants below,* and SOL A. DANN, *et al.*, and MARY L. GALLO, *et al.*, *Respondents, Plaintiffs below,* and ERWIN H. EZZES, HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, *et al.*, *Respondents, Objectors below.*	No. 893

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF OF CERTAIN DEFENDANTS BELOW, RESPONDENTS IN OPPOSITION

This brief is in opposition only to the Petition filed on behalf of Arthur Hoffman in No. 893 and does not relate to any other petitions which may be filed in this matter.

OPINIONS BELOW

The opinion of the Supreme Court of Delaware is reported at 205 A. 2d 343 and appears in the Petitioner's Appendix at page 9. The opinions of the Court of Chancery of Delaware approving the settlement of the stockholders' derivative suits below is reported at 198 A. 2d 185 and is printed at pages 61-105 of the Appendix hereto*. Pertinent oral decisions of the Court of Chancery, after approval of the settlement, on applications to stay the proceedings or reopen the hearings appear at RA 48-49 and RA 57-60.

QUESTIONS PRESENTED

1. Since Petitioner did not specially set up or claim in any of the courts below, nor did those courts decide any Constitutional issue now sought to be raised, does this Court have jurisdiction of the case under 28 U. S. C. § 1257(3)?

2. Since the decision of the highest court of Delaware can be wholly sustained on independent grounds of state law, does this Court have jurisdiction under 28 U. S. C. § 1257(3)?

3. Since Petitioner (a) was given notice of the proceeding for approval of the settlement, (b) appeared therein, (c) but did not seek or participate in the prehearing discovery, (d) did not attend the hearings of evidence and

*Further references to numbered pages of appendices will be preceded by the following abbreviations: PA for Petitioner's Appendix; RA for the Appendix annexed hereto; DA for Appendix of Certain Defendants-Below, Appellees filed in the Supreme Court of Delaware. The Dann Appendix in the Supreme Court of Delaware will be referred to as such.

(e) only after the opinion of the Court of Chancery approving the settlement applied to stay the proceedings to permit him to conduct discovery to decide whether or not judgment should be entered on the opinion and since (f) all the issues as to the merits of the claims and the charges of fraud referred to by Petitioner had been argued and considered by the Court of Chancery, is there a substantial federal question which this Court should review under 28 U. S. C. § 1257(3)?

STATEMENT OF CASE

The judgment below approves the settlement of two stockholders' derivative suits brought by various stockholders of Chrysler Corporation, a Delaware corporation. The action entitled *Dann, et al.* v. *Chrysler Corporation, et al.*, Civil Action No. 1330, was commenced on August 12, 1960 in the Court of Chancery of the State of Delaware, and the action entitled *Gallo, et al.* v. *Ackerman, et al.*, Civil Action No. 1585, was commenced on February 26, 1962 in the same court.

In approving the settlement, the Court of Chancery found that it was fair and in the best interests of Chrysler and its stockholders. After reviewing the allegations of conflicts of interest, mismanagement and unfair and excessive compensation, the Court of Chancery concluded (RA 93):

> "Having considered the nature of the claims and possible defenses, I agree with the basic position of the defendants and objectors that there is little, if anything, to the causes of action asserted by the plaintiffs."

In affirming the judgment of approval of the settlement, the Supreme Court of Delaware characterized plaintiffs'

claims as "devoid of merit" and said that "it was proper for the Chancellor to conclude, in view of the desirability of terminating litigation which, at best, was a harassment of Chrysler, to approve a settlement . . ." (PA 26).

After plaintiffs' suits were begun, there were various preliminary steps including the intervention of additional stockholders in the Dann action and consolidation of both suits for the purposes of discussing settlement. Counsel for plaintiffs in both actions conducted extensive discovery proceedings prior to entering into the Stipulation of Settlement, dated March 5, 1963. The discovery included numerous depositions and the production of hundreds of documents. After appraising the chances of success in the prosecution of their claims, all of the plaintiffs agreed to a settlement and compromise of their actions with defendants, subject however to court approval (DA 7-8). It was agreed in the Stipulation of Settlement that these two actions, together with other related actions, be dismissed with prejudice and releases be delivered to the defendants therein, with the exception of defendant Newberg; in return the Chrysler Incentive Compensation Plan was to be amended to reflect certain changes deemed to be advantageous to Chrysler's stockholders (DA 31-42).

A notice of hearings for approval of the settlement was sent to all stockholders of Chrysler on March 6, 1963 in accordance with Rules of the Court of Chancery pursuant to an order of that Court. The notice to stockholders notified them of the date for a hearing; invited stockholders to appear, if they desired to object; and informed them of the availability of pre-hearing remedies, which included discovery (RA 15-16; DA 7-30).

Various stockholders appeared to object to the settlement and obtained pre-hearing discovery by way of deposition, interrogatories and the production of a large number of documents. Prior to the hearings of evidence, the court

appointed to examine the record an *Amicus Curiae,* who made a comprehensive report, which was made available to all of the parties.

The hearings of evidence began on May 13, 1963 and lasted for six days. The witnesses testifying (some of them called by the objectors) included the Chairman of the Board, President, Treasurer, two former Presidents and Chairmen of the Board, a member of the Incentive Compensation Committee and other officials of Chrysler, a partner of Touche, Ross, Bailey & Smart, Chrysler's independent auditors, plaintiff, Sol A. Dann, and one of the attorneys who represented the defendants in the settlement negotiations. The issues examined covered all claims as to which any of the objectors sought to inquire, as well as the negotiation of the settlement. After argument and submission of briefs, the settlement was approved by the Court of Chancery with a condition with which there has since been full compliance.

Petitioner, Hoffman, a holder then of 10 shares of Chrysler stock, appeared in the proceedings for approval of settlement by filing on April 15, 1963 a notice of intention to appear, statement of his position and the grounds therefor, in which he alleged information as to the purchase by a named corporation of a 1957 Chrysler Imperial automobile claimed to be a "lemon", suggested that the court look into the quality of vehicles sold by Chrysler, alleged that the plaintiffs' charges were "possibly well founded", stated that the court "should hold full and protracted hearings", and alternatively urged that if the charges were "not justified" or "not well founded", then plaintiffs' attorneys should receive no fees (RA 17-21).

On April 26, 1963, Petitioner made a motion, among other things, to intervene in the two suits and to adjourn the hearing of evidence for six months to give him an opportunity to examine all parties to the litigation (RA 22-23).

On May 1, 1963 at a pre-hearing conference with the Court, Petitioner's New York attorney was admitted *pro hac vice* as requested in his motion and all of the other items of relief sought were withdrawn by Petitioner's counsel (RA 26, 28).

Petitioner neither participated in the discovery conducted by other objectors, nor requested any other discovery of his own. During no part of the extensive hearings of evidence did either Petitioner or any of his counsel appear. Petitioner thereafter submitted only a two page brief in which he asserted that the evidence at the hearings showed mismanagement at Chrysler and objected to the release of the defendants and the payment of their attorneys' fees. Petitioner, however, did not object to the adequacy of the hearings or the sufficiency of the evidence presented (RA 30).

On December 31, 1963 the Court of Chancery rendered its opinion approving the settlement on a condition (RA 61-101). On February 21, 1964 Petitioner again moved to intervene in the two suits, although he regarded himself already as a party, and to stay the proceedings for 90 days to permit him to conduct depositions and other unspecified discovery in order that he might determine whether to oppose entry of judgment on the court's opinion approving the settlement (RA 31).* Petitioner admitted that he had no personal or specific knowledge of the matters in issue and that his motion was based entirely on matters of record (RA 32, 50). Petitioner gave no indication that he desired any information that was not already a part of the record or that he wished to examine any particular witness who had not previously testified at the hearings which he refrained from attending (RA 50-52).

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*Petitioner's motion for intervention was granted to an extent satisfactory to Petitioner's counsel (RA 59-60).

Petitioner's motion for a stay was based solely on charges of fraud made shortly before by Sol A. Dann a plaintiff in one of the actions below, in applications to reopen the hearings. Dann's position at the time seemed to be that his attorneys had not vigorously pursued the "voluminous records of information and potential evidence" alleged to be in his files and that for such reason the settlement was fraudulent (Dann Appendix, p. 8). Petitioner sought the stay for the purpose of examining Dann and his files and the defendants. However, Dann having frequently claimed in the course of the litigation that he had evidence in his files supporting his claims, had been ordered by the court to, and he did, produce all of his files for inspection at the hearings of evidence held ten months earlier in May, 1963 (DA 397-398). At that time Dann objected to certain admissions made by his attorneys as to the lack of merit in his claims. Counsel for various parties, including objectors, inspected the Dann files and counsel for the Gallo plaintiffs represented to the court "that the Dann documents do not comprise evidence" (DA 409). No one, including Dann, contested this statement notwitnstanding as the court said, "the opportunity to inspect was fully afforded" (DA 421). One of the objectors, in his brief below, described the Dann files as "a hodge-podge of informers' notes". Dann was also called to testify by one of the objectors. Under oath, he agreed that he had no evidence, other than the papers produced, that would throw any light on his claims (DA 42). He also agreed that the settlement was in the best interest of Chrysler (DA 412-413).

After the approval of the settlement, Dann, stung by the findings of the court in its opinion of December 31, 1963 of lack of merit in his claims, renewed his earlier assertions as to potential evidence of merit in his claims, attacked his own attorneys and on this basis charged that the settlement was a fraud. Starting on February 7,

1964, when he personally appeared and argued, Dann made various applications to repudiate the settlement, stay the proceedings for sixty days, hold further proceedings and for other relief, each of which was denied after full consideration by the court.

Petitioner made his motion to stay the proceedings for 90 days on February 21, 1964 after the court had already heard and denied Dann's first application to repudiate the settlement. In the meantime, Dann had made further applications to delay or avoid the settlement. After another full hearing and consideration of Dann's further applications, as well as Petitioner's motion, the court denied both of their applications, saying that he had "read carefully all the material which [Dann] sent me, including the communications with counsel. . . . From all that I have seen that has been produced here, and I consider only Mr. Dann because Mr. Bader [Petitioner's counsel] has no knowledge of his own but relies merely on what Mr. Dann is saying . . . it is my conclusion that at best Mr. Dann would only hope to be able to turn up something if there were further discovery permitted" (DA 457-458). Not only Dann, but Petitioner as well, had had ample opportunity for discovery previously.

Petitioner and other objectors thereafter appealed to the Supreme Court of Delaware. Dann took no appeal. However, prior to the argument of the appeal, Dann submitted an Appendix and a brief, reiterating his charges and seeking to have the case remanded to the Court of Chancery for the taking of further proof. Since under well-recognized Delaware practice one who has not taken an appeal cannot argue in opposition to the judgment below, certain defendants moved to strike Dann's brief. The motion was granted by the Supreme Court of Delaware on the express ground that Dann had no standing to argue in opposition to the

judgment below (PA 30). Although Petitioner submitted briefs on the appeal, he did not appear at the argument.

At no time during any of the proceedings in the Delaware courts did Petitioner purport to raise any questions under the Constitution of the United States or any other federal question. Indeed, an examination of all of Petitioner's papers and statements in the Delaware courts fails to reveal any substantial question of law of any kind.

Petitioner now brings his petition to this Court requesting that the decision of the Supreme Court of Delaware be set aside and proceedings remanded to the Court of Chancery for further investigation.

ARGUMENT

1. Any title, right, privilege or immunity claimed under the Constitution must have been specially set up or claimed in the courts below to give the Supreme Court jurisdiction. 28 U. S. C. § 1257(3). *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 651 (1942); *New York* v. *Kleinert,* 268 U. S. 646, 650 (1925); *Missouri Pacific Ry. Co.* v. *Taber,* 244 U. S. 200, 201 (1917). It is also essential that there be a final judgment and decree passing upon the constitutional point, rendered "by the highest court of a state in which a decision could be made." 28 U. S. C. § 1257. As was said in the *Memphis Gas* case (315 U. S. 651):

> ". . . Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the state supreme court to be in issue, we must dismiss the appeal for want of jurisdiction . . . ."

Petitioner asserts that he argued constitutional questions before the Supreme Court of Delaware (Pet. p. 4) but no-

where does he indicate the manner in which the federal questions sought to be reviewed were raised. The opinion of the Supreme Court of Delaware (PA 9) makes no reference to any federal question.

Rule 23(f) of this Court requires pertinent quotations of specific portions of the record to be made in Petitioner's statement of his case to show that a federal question was timely and properly raised in the court of first instance and the appellate court. Petitioner has not and cannot comply with this Rule.

Petitioner seems to rely on Dann's applications which themselves involved no federal questions. In addition, Dann himself is in no position to pursue any questions because of his failure to appeal to the Supreme Court of Delaware. Even if Petitioner could press Dann's contentions, it would avail him nothing since Dann, like the Petitioner, raised no federal question in his applications to the court of first instance.

Because no constitutional question has been specially set up or claimed or passed upon by the highest court of Delaware, the Petition for Certiorari should be denied.

2. It is well settled that this Court will decline to review state court judgments which are based on adequate non-federal grounds. *Murdock* v. *City of Memphis*, 87 U. S. (20 Wall.) 590, 634-6 (1875), *Herb* v. *Pitcairn*, 324 U. S. 117, 125-6 (1945). Even if a federal claim is properly raised, as it was not by Petitioner, and the state court declines to consider it and renders its decision solely on non-federal grounds, this Court has declined jurisdiction. *Wood* v. *Chesborough*, 228 U. S. 672, 677 (1913).

The State of Delaware has consistently adhered to the principle that a court, when called upon to approve a settlement and compromise of a pending litigation, is not required to try all the issues involved or to decide them on their

merits. The court is only called upon to consider the nature of the claims, the possible defenses to them and the legal and factual obstacles facing the plaintiff in the event of a trial, and exercise a business judgment in determining whether the proposed compromise is reasonable in the circumstances. *In re Ortiz' Estate*, 26 Del. Ch. 240, 253-54, 27 A. 2d 368, 374 (1942), approved by the Supreme Court of Delaware in *Perrine* v. *Pennroad Corp.*, 29 Del. Ch. 531, 550, 47 A. 2d 479, 488 (1946). The Supreme Court of Delaware rendered its decision below wholly in compliance with applicable Delaware law. *Kleinman* v. *Saminsky*, 200 A. 2d 572, 575 (Del. 1964) cert. denied, 13 L. Ed. 2d 174 (1964) (No. 392); *Rome* v. *Archer*, 197 A. 2d 49 (1964).

With no question here raised as to the adequacy of the grounds of decision, and no doubt that the decision can be wholly sustained on independent grounds of state law, this Court should deny the Petition.

3. Petitioner argues for the first time in his Petition in this Court that his rights and privileges as a Chrysler stockholder under the 14th Amendment were abridged because he was not awarded the right to fully litigate the merits of the claims asserted in the complaints in the Court of Chancery of Delaware. In fact, he was accorded, but did not accept, the right to discover before and explore at the hearings of evidence the merits of these claims. Furthermore, the argument is patently absurd. Such an argument, if sustained, would prevent parties in derivative stockholder litigation from seeking and a court from approving an advantageous settlement thereof, if a single stockholder insisted on a trial on the merits. This is not the law for "it is not necessary for the court to try the issues of the case for the reason that any such requirement would defeat the purpose of settlement itself." *Krinsky* v. *Helfand*,

38 Del. Ch. 553, 156 A.2d 90, 94 (1959). To the same effect, *Braun* v. *Fleming-Hall Tobacco Co.*, 33 Del. Ch. 246, 92 A. 2d 302, 310 (1952); *Rome* v. *Archer*, 197 A. 2d 49, 53 (1964).

4. Petitioner's citation of authorities also sheds no light. The only cases he cites which involve stockholder's derivative actions turn on questions of state law and none of them involve any constitutional question. The only cases in his Petition which involve constitutional questions, *Chambers* v. *Baltimore*, 207 U. S. 142 (1907) and *Prudential Insurance Company* v. *Cheek*, 259 U. S. 530 (1922), are cited by him for the first time in his Petition to this Court and have nothing remotely to do with stockholder s derivative suits, or even fraud.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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Excerpts From Notice to the Stockholders of Chrysler Corporation

[2-3] This is to inform you of certain developments in the above lawsuits. A Stipulation of Settlement has been signed for the settlement of these lawsuits, which is conditional upon a finding by the Court that the settlement is fair, adequate and reasonable and should be consummated. In accordance with procedure in such situations, the Court has directed that a hearing be held before it passes upon the fairness, adequacy and reasonableness of the settlement.

You are hereby notified that pursuant to an order of the Chancellor of the State of Delaware, dated March 6, 1963, in accordance with Rule 23(c) of the Rules of the Court of Chancery of the State of Delaware, a hearing on the proposed settlement will be held in the Courtroom of the Court of Chancery of the State of Delaware, in and for New Castle County, Eleventh and King Streets, Wilmington, Delaware, at 11:00 o'clock A.M., Eastern Daylight Time, on May 13, 1963. Any stockholder of Chrysler may show cause, if any he has, at the hearing why the settlement of these actions, as provided in the Stipulation of Settlement, dated March 5, 1963, should not be approved by the Court as fair, adequate and reasonable and why these actions should not be dismissed as provided in the Stipulation of Settlement. The hearing may be adjourned from time to time by announcement at the hearing or at any adjournment thereof without further notice.

The plaintiffs in the above actions (sometimes hereinafter called the "Dann action", Civil Action No. 1330, and the "Gallo action", Civil Action No. 1585) are stockholders of Chrysler Corporation (hereinafter called "Chrysler"). The actions were instituted derivatively purportedly in behalf of and for the benefit of Chrysler. The Dann action

was commenced on August 12, 1960. The Gallo action was commenced on February 26, 1962.

* * *

[18] At the hearing on May 13, 1963, any stockholder of Chrysler or party to either of the above actions may present any evidence that may be relevant to the issues to be heard; provided, however, that no such person who is not a party of the Stipulation of Settlement shall be heard and no papers or briefs submitted by any such person shall be received or considered by the Court, except by special permission of the Court, unless, on or before April 22, 1963, notice of intention to appear, a statement of the position to be asserted and the grounds therefor, and copies of such papers and briefs are served:

* * *

[19] and filed with Registry of Chancery, Public Building, Wilmington, Delaware, in which event such stockholder, if he wishes to avail himself of any pre-hearing remedies to which he may be entitled under the Rules of the Court of Chancery, subject to any applicable orders of the Court, must do so prior to the date set for the hearing. The Stipulation of Settlement, the depositions, all exhibits referred to therein, petitions for allowance of counsel fees, and all pleadings and other documents in the actions will be on file on and after March 25, 1963, with the Register in Chancery, Public Building, Eleventh and King Streets, Wilmington, Delaware and available for inspection there by any stockholder of Chrysler, in person or by a duly authorized attorney during regular business hours on each day, other than Saturdays, Sundays and other legal holidays.

* * *

Hoffman's Notice of Intention to Appear, Statement of the Position To Be Asserted, and the Grounds Therefor

[2-8] Arthur Hoffman, of 12 Landau Avenue, Elmont, New York, a holder of ten (10) shares of the common stock of Chrysler Corporation hereby opposes the proposed settlement set forth in the above-entitled action and intends to appear at the hearing on May 13, 1963 at 11 o'clock in order to oppose such settlement.

Pursuant to the Notice by Order of the Court dated March 6, 1963, received by the undersigned as a stockholder of Chrysler Corporation, the following sets forth the position to be asserted in opposition to said settlement at the hearing and the grounds therefor.

In any stockholder's action the interest of the corporation is paramount and no such suit should be prosecuted merely for the personal pecuniary gain of the stockholder prosecuting the same.

The stockholders involved herein have asserted a number of serious charges against the defendant corporation involving financial interest of past and present directors and/or officers of Chrysler Corporation in Chrysler suppliers, personal profits from transactions between Chrysler and suppliers, charges of mismanagement by defendants as directors and officers of Chrysler during the years of 1956 to 1961, and charges relating to the incentive compensation and stock option plans of Chrysler including allegations that they were not soundly devised and provided rewards out of proportion to the performance required to gain the awards.

By the terms of the proposed settlement the defendants admit that the incentive compensation and stock option plans were not soundly devised since they agree, in connection with the settlement, to revise said plans as set forth

on Pages 15 and 16 of the proposal. If, in fact, these plans constituted unlawful diversion of corporate assets to personal profit then, it is submitted, that the defendants should not be given General Releases nor should Chrysler Corporation pay the expenses of these defendants in connection with the litigation.

The other charges made by the plaintiffs are claimed to have been justified and the situation in connection with Chrysler Corporation during the years involved seems to indicate to the undersigned substantial basis for the charges. As a matter of fact the undersigned has received information that in 1957 a firm known as Patents Management Corporation purchased a 1957 Chrysler Imperial which was claimed to be a "lemon". One of the officers of Patents Management Corporation stated to the undersigned that at a hearing on a lawsuit brought by this company against Chrysler Corporation one of the attorneys for Chrysler stated that the litigation involving this automobile had cost Chrysler over Ten Thousand ($10,000.00) Dollars but that they had a policy of refusing to compromise any product claims unless they were absolutely certain that they had no chance of success in a lawsuit.

The undersigned believes that this Court should look into the quality of vehicles sold by Chrysler during the period involved in order to determine whether the alleged financial interest by officers and directors of Chrysler in such Chrysler suppliers caused a deterioration of quality of the supplies purchased by Chrysler relating to vehicles manufactured during the period.

The undersigned does not believe that plaintiffs, after bringing charges which they believe to be well founded, and which clearly indicate can be criticized, can discontinue

an action of this type to the prejudice of the stockholders of Chrysler. A review of these charges indicates to the undersigned that they are possibly well founded and that this Court, together with the regulatory agencies of the United States Government, including the Securities and Exchange Commission, should hold full and protracted discovery and hearings with respect to such charges.

The undersigned has been informed that officers and directors of a corporation owe a fiduciary obligation to the corporation. The charges outlined in the Complaint, at least superficially, do not appear to the undersigned to be "primarily within the area of business judgment". The undersigned is particularly impressed by the portion of the Notice contained on Page 4 reading as follows:

> "* * * Although criticisms might be leveled at some of the transactions questioned, * * *"

Since the defendant corporation is one of the largest public companies in the country it does not appear to the undersigned that it would be in the interest of the stockholders to permit management which has been guilty of shortcomings and errors which appear superficially to constitute breach of fiduciary obligations, to emerge unscathed.

On the other hand if the plaintiffs' charges are not justified, then it does not appear to the undersigned that the plaintiffs and their attorneys should be rewarded at the expense of Chrysler stockholders. Thus, if the charges are not well founded, then the plaintiffs' attorneys should receive no fees whatsoever. If the charges are well founded then the attorneys' fees should be paid by the officers and directors of Chrysler who have been involved in the charges.

Hoffman's Notice of Intention to Appear, Statement of the Position To Be Asserted, and the Grounds Therefor

The Settlement also involves an extremely serious matter which goes far beyond a mere stockholders' suit. The facts set forth in the Notice of Hearing indicate that the charges made by the stockholders have a probative basis. The record seems to show that in an effort to "punish" the plaintiff Dann the defendant Chrysler Corporation brought an action for alleged "libel" and attached Dann's stock. That this suit clearly had no basis is seen by the fact that the defendant Chrysler, as part of the settlement here, is paying the sum of Twenty Thousand ($20,000.00) Dollars to Dann's attorneys and is dismissing said libel action with prejudice. This Court should not countenance actions of this type taken against a petitioning stockholder since, if mismanagement of a corporation is shown, a stockholder should have the right to bring these matters to the Court's attention. To reward officers and directors of a corporation who are parties to a situation of this type and allow them to escape unscathed after bringing a suit having no basis whatsoever, and requiring the stockholders to pay the damages sustained by Dann is, it is submitted, inequitable.

In summary, therefore, the undersigned opposes the settlement arrived at and suggests that justice will be served by bringing this case to trial. If the trial results in a vindication of the corporation's position then the fees of the defendants will, of course, be paid. If the trial results in a vindication of the plaintiffs' Complaint then, it is submitted, that the officers and directors of Chrysler involved in the mismanagement alleged, should be seriously dealt with. Not only should their attorneys' fees not be paid but they should be personally held liable for any damages that have resulted by reason of such mismanagement.

Furthermore it appears that this Court should look into the possible deterioration of the quality of vehicles manu-

factured by Chrysler during the period when the questioned relationships between the officers and directors of the defendant Chrysler Corporation and its suppliers were involved.

s/ ARTHUR HOFFMAN
Arthur Hoffman

(Verified April 11, 1963.)

Hoffman's Motion for Intervention, Adjournment and Other Relief

[1-2] THE OBJECTANT, ARTHUR HOFFMAN, of 12 Landau Avenue, Elmont, New York, hereby moves this Court for the entry of an Order providing as follows:

1. That the Objectant be granted leave by this Court to intervene in the Instant Actions and to be made parties thereto, the captions of these actions to read respectively SOL A. DANN, et al., Plaintiffs, v. CHRYSLER CORPORATION, et al., Defendants, and ARTHUR HOFFMAN, et al., Objectants, MARY L. GALLO, et al., Plaintiffs, v. PAUL C. ACKERMAN, et al., Defendants, and ARTHUR HOFFMAN, et al., Objectants.

2. That Objectant's personal attorney, I. WALTON BADER, a member of the Bar of the Supreme Court of the United States, the State of New York, and the District of Columbia, be permitted to appear for Objectant *pro haec vice* in this action.

3. That the hearing set for May 13th, 1963 be adjourned for a period of six (6) months to give Objectant and others who may be interested an opportunity to examine all parties to this litigation to determine the facts involved.

4. That this Court petition the Securities & Exchange Commission, pursuant to an authority contained in the Securities Act, to conduct its own investigation of all of the facts and circumstances surrounding this litigation and report to the Court as to the facts found.

5. That this Court direct the Corporate Defendant and the individual Defendants to set forth the amount of legal

fees charged, paid, billed and prospectively incurred in connection with this litigation and that such fees be brought to the attention of all the stockholders of the Corporate Defendant prior to termination of this action.

6. That this Court grant Objectant such other, further and different relief as this Court may deem just and proper.

.....

Arthur Hoffman, Objectant
12 Landau Avenue
Elmont, New York

Moving Affidavit

[1-3] ARTHUR HOFFMAN, being duly sworn, deposes and says:

I am one of the Objectants herein.

This application, for multiple relief, is made to this Court in connection with the above actions.

The first inkling that I had of any proposed settlement in this litigation came through a notice sent to all of the stockholders of Chrysler wherein the proposed settlement was set forth.

I, therefore, conferred with my attorney, I. Walton Bader, in New York City, and filed Notice Of Intention to Appear in accordance with the Notice previously sent me.

As now appears from the Motion made by the Defendants Chrysler and its officers a considerable amount of legal work is now contemplated.

Since my finances do not permit my employing an attorney admitted to the Courts of Delaware the undersigned seeks leave of this Court to permit his personal attorney, I. Walton Bader, of 50 Church Street, New York 7, New York, a member of the Bar of the Supreme Court of the United States, the State of New York, and the District of Columbia, to appear *pro haec vice* in this litigation.

A review of the Motion made by the Moving Defendants indicates that these Defendants have not informed the Court as to the amount of their legal fees with which they intend to saddle the stockholders of Chrysler. The Moving papers further indicate that the Plaintiff Dann is attempting to obtain an extremely large allowance for his services and expenses from this Court, also at the expense of the stockholders of Chrysler.

In order to protect the interest of Chrysler stockholders, who apparently are not properly represented by either side

in this litigation, the undersigned requests leave to intervene as a party in the litigation in order to insure that no untoward advantage is being taken of Chrysler stockholders.

The undersigned further believes that a proper investigation of the facts in these actions would take at least six (6) months and therefore suggests that this Court adjourn the settlement here for this period of time in order to give the Objectants the opportunity to examine all parties to the litigation and determine the facts.

The undersigned further suggests that the Securities & Exchange Commission be requested by this Court to conduct a full investigation of the management of Chrysler during the period of time set forth in this litigation in order to determine whether the Instant Actions should be continued or settled and, if settled, under what terms and conditions.

WHEREFORE Objectant prays that the Instant Motion be in all respects granted.

.....

Arthur Hoffman, Objectant

Sworn to and subscribed before
me this 26 day of April, 1963.

/s/ I. BAIRD GREENBERG
Notary Public

Excerpts From Transcript of Pre-Hearing Conference of May 1, 1963

MORNING SESSION

[30-31] Mr. Bader: May it please the court, my name is Walton Bader. I represent Mr. Hoffman. I am a New York attorney, and have no standing before this court unless your Honor will permit me to appear *pro hac vice.*

The Court: Your client's papers were served and filed. Does anyone object to Mr. Bader appearing under those circumstances, since his client pleads poverty and inability to obtain Delaware counsel, as I understand it?

Mr. Bader: That's correct, your Honor.

The Court: Hearing no objection, we will extend the courtesy and permit you to appear *pro hac vice.*

Mr. Bader: Thank you, your Honor.

* * *

AFTERNOON SESSION

[41] Mr. Corroon: Your Honor, the defendants' counsel have consulted with the objectants' counsel and we have come to some degree of agreement on this list of matters that I have presented, so I will run through them.

* * *

[44] Items 25, 26, 27 and 28 have been withdrawn.

* * *

[113-115] DANN v. CHRYSLER

Matters which May Arise
At Conference on May 1, 1963

1. Motion to separate issues (Corroon).

Excerpts From Transcript of Pre-Hearing Conference of May 1, 1963

2. Appointment of general counsel for objectants (Corroon).

3. Consolidation of objections for purpose of depositions and discovery (Corroon).

4. Hastings agenda.

5. Gallo agenda.

6. Marking sessions for documents (Corroon).

7. Order and length of opening statements at hearing (Corroon).

8. Motion that Love and Townsend be directed to appear at the hearing (Hastings).

9. Production of documents by Chrysler at the hearing (Hastings).

10. Production of minutes by Chrysler at the hearing (Hastings).

11. Names and addresses of all witnesses and experts whom defendants intend to have testify at the hearing, etc. (Hastings).

12. Motion that all discovery, including discovery relating to fees, be completed before May 13 (Hastings).

13. Motion that Dann file affidavit or produce documents (Gallo).

14. Motion re Dann deposition (Gallo).

15. Motion that Mortis' objections be made more specific (Gallo).

Excerpts From Transcript of Pre-Hearing Conference of May 1, 1963

16. Proposal of Koenigsberg to appoint general counsel for proponents of settlement (Miller).

17. Proposal that statements of issues and lists of witnesses be furnished (Miller).

18. Interrogatories addressed to Chrysler (Miller).

19. Request that Chrysler produce documents at the hearing (Miller).

20. Request for admissions (Miller).

21. Motion for rulings on Dabney deposition (Miller).

22. Notice of resumption of Dabney deposition (Miller).

23. Notice that Dann appear at the hearing with records (Miller).

24. Notice for Colbert, Minor, Keller, Rowe, Quinn, Laughna, Love and Townsend to attend hearing (Miller).

25. Intervention by Hoffman (Hoffman).

26. Adjournment for six months (Hoffman).

27. Amounts of defendants' attorneys' fees (Hoffman).

28. Referral to SEC (Hoffman).

29. Motion to quash notice to attend hearing (Minor).

30. Notice of depositions of Misch, Graham, McElroy, Simons and Boyd (Morris).

31. Motion to produce documents (Morris).

32. Notice of depositions of Colbert, Warren, Keller, Misch, Love, McNeill (Handleman).

Excerpts From Transcript of Pre-Hearing Conference of May 1, 1963

33. Notice of depositions of Kuller, Tousche, Ross (Handleman).

34. Motion to produce (Handleman).

35. Proof or concession that objectants are stockholders of Chrysler.

* * *

Brief of Objector Arthur Hoffman

[1-2] The objector Hoffman, at this time, will merely make certain observations based upon the evidence adduced at the hearing upon the objections.

Firstly, it is respectfully pointed out that the amount of legal fees to be paid to the attorneys representing the individual defendants, which amount was revealed at the hearing, are totally excessive in view of the fact that Chrysler's attorneys were carrying most of the defense of this litigation. Further, the evidence at the hearing clearly showed that there was a substantial basis for the plaintiffs' claims of mismanagement at Chrysler. Therefore, to saddle the stockholders of Chrysler with attorneys' fees for services rendered for the benefit of officers and directors who condoned mismanagement would appear to be unconscionable.

In addition to the above the evidence at the hearing clearly showed actionable mismanagement on the part of Chrysler and to permit the officers and directors of this firm to get off scot free would appear to be unwarranted.

The undersigned requests the indulgence of the Court with respect to the law involved which will be set forth in detail at the time that Reply Briefs are due.

Dated: June 26, 1963

Respectfully submitted,

ARTHUR HOFFMAN, Objector
12 Landau Avenue
Elmont, New York

Hoffman's Motion to Stay Proceedings, to Take Depositions, and for Intervention

[1-2] Arthur Hoffman, an objectant herein, hereby moves for a stay of proceedings for ninety (90) days in connection with the proposed settlement of the above-entitled actions and pursuant to Rules 26 and 34 to take the depositions of Sol A. Dann, Chrysler Corporation by its appropriate officer, NAFI Corporation by its appropriate officer, the corporate defendants named in the Complaints herein by their appropriate officers, and the individual defendants named in the Complaints herein, and to direct the parties, whose depositions are to be taken, to produce all relevant books, records, documents and tangible things relating to the issues involved herein and to permit the said objectant Arthur Hoffman to intervene in the above-entitled actions as a party plaintiff.

The grounds supporting the relief requested are set forth in the accompanying affidavit of Arthur Hoffman which is made a part of this Motion.

Dated: February 21, 1964

Yours, etc.

SOTIERE S. KAPSALIS
Attorney for Objector
Arthur Hoffman
1001 Bank of Delaware Building
Wilmington, Delaware

. . . . . .

I. WALTON BADER
Attorney for Objector
Arthur Hoffman
170 Broadway
New York, New York 10038

Affidavit of Arthur Hoffman in Support of Multiple Motion

[1-4] ARTHUR HOFFMAN, being duly sworn, deposes and says:

I am a present stockholder in Chrysler Corporation and own twenty (20) shares of the common stock of that company. I am a stockholder of record on the books of said corporation and reside at 12 Landau Avenue, Elmont, New York.

This affidavit is submitted in support of the multiple Motion to permit me to take the depositions of the plaintiff Dann and the defendants in the above-entitled actions pursuant to Rule 26 and to require said plaintiff and defendants to produce all relevant and material books. records, documents and tangible things.

The Motion further seeks a stay of all proceedings in connection with the proposed settlement of the above-entitled stockholders' suits and to permit me to intervene therein as a party plaintiff.

In my opinion the charges made by Dann and Gallo, if in fact sustained, constitute a national disgrace particularly in view of the fact that Chrysler Corporation is one of the largest business entities in the United States.

I must confess to the Court that my specific knowledge of the charges involved has been derived from a reading of the Dann and Gallo Complaints and from the proceedings in connection with the proposed settlement. I have no personal knowledge of the matters involved nor have I taken any depositions in connection therewith.

My attorneys have advised me that the proceedings heretofore had indicated that the charges made by Dann and Gallo have some basis but that the present record is insufficient to warrant any conclusive determination.

My attorneys have further advised me that the Court's opinion approving the settlement of the stockholders' litigation involved herein was made on the basis of the record adduced before this Court.

My attorneys have received a telegram from the plaintiff Dann as well as a large number of documents which indicate both to my attorneys and to myself the very serious possibility of fraud in connection with the settlement of the above litigation.

The charges made by Dann are of a very serious nature and, if proven, would warrant, in both my attorneys' opinion and my own, the imposition of the most severe sanctions that this Court could make.

Obviously I cannot, merely on the basis of assertions made by Dann, state categorically that fraud has been involved in the making of the instant settlement. However I would be in a position to do so if I had an opportunity to examine all of the parties concerning all of the relevant facts and circumstances involved in the making of the settlement involved herein.

There appears to be enough in the papers to indicate substantial grounds for believing that fraud has been involved. Therefore I believe that the interests of the stockholders and of justice would be served by permitting me to have the opportunity of taking depositions of all of the parties involved and of requiring these parties to produce all relevant and material documents involving the issues of this litigation.

I realize that this proceeding has been protracted for a considerable period and therefore am willing to agree that, subject to the cooperation of the parties to be examined, that the depositions can be concluded within ninety

Affidavit of Arthur Hoffman in Support of Multiple Motion

(90) days. At the conclusion of this period I would be in a position to make an alternative application to the Court for leave to continue this litigation to trial and judgment, for leave to request the imposition of additional conditions in connection with any settlement of the aforesaid litigation, or for leave to permit the settlement to go forward on the present basis.

The undersigned regrets that the shortness of time involved in connection with this application prevents the filing of an appropriate Memorandum of Law but I have been advised by my attorneys that wherever there is the slightest possibility of fraud in connection with stockholders suits the Court must suspend all proceedings until a full and thorough investigation of any allegations of fraud is concluded.

I should be most happy to cooperate with the Amicus Curia appointed by this Court in order to fully and thoroughly investigate the serious charges that have now been made.

I believe that I probably am a party to the above-entitled litigation by reason of my filing of objections to the settlement thereof. However, in order to remove all doubts, I request that this Court formally grant me the right to intervene as a party and to amend the captions of the actions accordingly.

.....

Arthur Hoffman

Sworn to before me this 21st
day of February, 1964.

.....

Notary Public

Excerpts from Transcript of Hearing of February 7, 1964

[3-12] Mr. Dann: May I be heard, your Honor.

The Court: Yes, but I assume it will not be to argue the merits because we will take that up a little later.

Mr. Dann: May it please his Honor, the Court, I would like to state my position concerning any of the proposed orders that have been submitted or may be submitted to you.

Since the publication of the stockholders' notice, but more especially since this Court's opinion, both I and my family have been terribly hurt at the way these have been interpreted in the press and by the public generally. In fact, your opinion was misinterpreted to mean that there was no basis for bringing this action, when in fact your Honor's opinion did not say so. This Court was careful to say it was only weighing the probability of success in meeting the burden of proof by legal, competent evidence according to what evidence was in the record at the time you rendered your opinion. This Court never attacked my good faith or the good faith of plaintiffs in bringing this suit, and the Court specifically rejected objectors' contention that the action should be dismissed because the objectors claimed that we did not state a cause of action.

Yet the misinterpretation of the stockholders' notice, and the warping of this Court's opinion in the press, by publicity which may have emanated from interested sources, has seriously embarrassed me and affected me no end. Persons who came to me previously with information about the misconduct of the various defendants have asked me how much did I get for selling out; how much was I paid off for giving the defendants a whitewash, and other vicious ennuendos and statements impugning my reputation and that of my associates.

This I have had to endure despite the years of work I and my office have put on this case. The embarrassment, and the pressures and inconvenience that I and my family have been subjected to, I resent, and am hurt by such personal attacks upon my integrity.

I resent the unfair warping and slanting of your Honor's opinion. I did not ask you or anyone for praise for what I did, and I respectfully submit that I don't deserve to be discredited and be made a scapegoat, directly or indirectly, and primarily indirectly because your Honor, I am sure did not intend to.

I need this Court's help in order to answer these vicious attacks against me and to make sure that I will have the opportunity to present my position and present to your Honor all of the facts concerning this case before any order is approved.

Therefore, I am offering into the record and handing to the stenographer, copies of the letters I sent to my co-counsel, dated January 24, 1964 and February 3, 1964, from whom I have had to disengage myself. I am asking the Court to consider these statements, and the statements made in these letters, and the exhibits referred to and attached thereto, and my further statement to the Court at this time, as though read into the record.

I further want to give the Court a copy of an alleged telephone conversation that my office received from the office of Hastings, Taylor and Willard, that Senator Hastings is alleged to have had with Judge Peck concerning the things that I had to do and must do in order to get this settlement approved by the Court.

I also want to hand to the stenographer a copy of an affidavit given to me by Mr. Horvath, concerning the promises made to him of $50,000 by my co-counsel if he would

discharge me and give them power of attorney. After having returned to Detroit, and after having executed that power of attorney, he revoked that power of attorney, as this document shows.

I also want to have the Court have the benefit——

Mr. Dabney: May I register my objection to these materials being received before being heard and before your Honor rules. There are only partial statements, and if we get into this of course we will get fuller statements.

The Court: I am considering this as nothing more than a statement. This is not a trial this morning. This is merely being recorded as statements that are made and is not evidence being taken.

Mr. Dann: I would like to have your Honor have the benefit of letters of my former co-counsel assuring me that they had not made the statements contained in the stockholders' notice, but that the confusion which arose would be cleared up before the Court when they presented their petition for fees.

I would like to have your Honor see the letter that I sent to my co-counsel insisting that all of these matters concerning this case be brought to your Honor's attention in fairness to this Court in order to correct, as I say in my letter to them of March 15, any false impressions that may have been conveyed to the Court, as well as others, by reason of the erroneous statements in the stipulation, the notice to the stockholders, and press releases.

There is correspondence over the signature of some of my co-counsel saying that the full position will be presented later. There are any number of letters in this file in which I say to them that in fairness to the Court this should be done promptly, that your Honor should be fully advised,

and if these depositions were phony depositions, as I contend in some cases they were, with prearranged questions not to go into the matters and scope of matters, then that should be brought to your Honor's attention instead of, as I think your Honor may have been misled into thinking that they were gone into at great length and depth, especially that of Mr. K. T. Keller and members of his family.

As far as I know, aside from statements in the stockholders' notice, our co-counsel never concluded that there was no merit to the cause of action. I repeatedly asked them to follow your Honor's interpretation of what a deposition should contain and what a deposition should do, as set forth in your Honor's letter, if my memory serves me correctly—I'll get the letter—that a deposition should be able to discover evidence or lead to evidence.

It was this tremendous amount of leads to evidence that my files contain that practically none of those deposed were ever asked about. Certainly the Gallos' counsel never asked questions about them although they were requested to come to Detroit and offered the opportunity to do it. The first time they examined them was when these were brought down to Court, and examined them at the hotel for two days, just turning the pages over and making some notations.

I would like to have your Honor know that Mr. Dabney in a memorandum that he sent to Karl Horvath in 1962 at that time said does the new management seriously intend at this late date to deny that there was dishonesty in the old management? How about Keller, Colbert, Newburg, Minor, Laughna, to mention only a few.

When Mr. Dabney came to Detroit and examined some of the information in the file, he wrote a letter to the Hastings firm setting forth that I've looked over the file ma-

terial and we will have no difficulty in making a respectable showing. I requested repeatedly to bring to your Honor's attention the position that Mr. Rosenbaum and I repeatedly took, that it would be unfair to this corporation and its stockholders if Newburg alone was made the scapegoat for what had occured here, that if all these defendants were released without contribution it wouldn't be fair to the stockholders.

But then we had to take into consideration the statement made to me by Mr. Love, "Mr. Dann, if we can disprove all of your charges, the airing of all this in public, there won't be a Chrysler Corporation in five years, and on the other hand, if you prove all of your charges you will have a bankrupt corporation on your hands."

This presented a serious problem, how to deal with it and deal with it honestly and honorably. I at that time said if it can be done with the Court being fully advised of all of the information concerning these men and their wrongdoings, I am willing to go along with it, but I don't want to be a party to any fraud on the Court, I don't want to be a party to any deception, and I think if the Court knew of how serious the situation was, the Court would understand why I too would go along with a situation like this, and the stockholders would understand.

Many attempts were made to pressure me into making a statement that there was no information which would lead to evidence. And as my correspondence says, I would never do that over my dead body, because I realized to some extent the possible consequences not only to the public but to this very corporation because if these defendants can all go scot free with one scapegoat, it would only invite those who have been wrongdoers to continue doing these wrongs.

The whole purpose of this litigation and the effort that has been put into it would have been of naught.

It would present a horrible example, in my opinion, for other stockholders' litigation. It would invite instead of deterring those who start strike suits. It would even deter those who have a legitimate claim from coming into court, and this is what I am afraid of.

If after all I have done I could be made the scapegoat, unintentionally I am sure on your Honor's part, then what should somebody else say who has put in lesser time and lesser effort in the situation?

I have in the past, and I still want to believe, that those who say it is wrong to seek justice in court should think twice. I as a lawyer could not go along with that kind of a feeling on the part of certain elements of the public.

For the many reasons as I pointed out in these letters that I want to give to the Court and have read into the record, I urge your Honor at this time to give me an opportunity to engage other counsel in behalf not only of myself but of the other stockholders.

I have been in contact with a nationally known figure and attorney. I am sure your Honor knows him, and he speaks highly of you, as I myself feel. It was he that encouraged me to come here and make this presentation to you. He said, "The court, I know, is an honorable man, and instead of being afraid, as your counsel has made you feel, of coming before this Court and telling these things, on the contrary I think you owe it to the Court: I think the Court is entitled to it."

So I would like to complete my arrangements, and I am pleading now for an opportunity to fully present and explain my position before your Honor considers an order, or signs any order, that will tie the Court's hands from doing

that which it may not want to do after it hears and contemplates some of the things that might go into the claims of their petition for fees, or the things outlined in the affidavit in support of it, which are inconsistent, according to statement of Judge Peck to Mr. Hastings in his memorandum—this is supposed to be a copy of his conversation—and the statements made in the stockholders' notice.

I am not in an enviable position before the Court, I realize that, but I feel I had to do this out of respect for this Court.

The Court: May I ask you one question. Do you impugn your testimony given at the settlement hearing in any way?

Mr. Dann: I don't impugn it but it may need explanation in view of the interpretation that your Honor may have placed upon it.

The Court: You don't mean explicitly, because I don't believe it is referred to explicitly in the opinion, isn't that so?

Mr. Dann: I don't recall whether it is referred to explicitly except in the Wall Street release on what your Honor held. They said Mr. Dann and his counsel came to the conclusion, presumably telling the public that these were included in your Honor's opinion, but I couldn't find it.

The Court: Is there anything else you care to say, Mr. Dann?

Mr. Dann: As I say, I would like to have the opportunity to explain all of these more fully to the Court.

The Court: You may hand the reporter copies of the documents you have in mind. I will determine whether or not, in fairness to the other parties involved, they should be spread upon the record.

Mr. Dann:

* * *

Excerpts from Transcript of Hearing of February 7, 1964

[14-25] There are many additional items in my file in Detroit. I only happened to bring along those items which I took to New York in order to confer with other counsel, and that is why I would like the opportunity to complete the presentation before the court, because after a case involving as much as this does—not necessarily in money but as an example to the public of what lawyers and courts stand for and what they will not stand for—it should, in fact it must, in my opinion, not terminate with conflicts of interest, possible conflicts of interest, on the part of any of the attorneys involved.

But there is something wrong here, something wrong here, and I think and believe, as this man does who urged me to come and tell you, that your Honor would get to the bottom of this. I believe, as he indicated, that this court will not stand for being used, any more than I want to be, used, to give anyone who may be guilty of wrongdoing a whitewash at the expense of my reputation.

I realize the seriousness of this; I am sure the court does. But what to do, how to proceed now, raises some serious questions, serious problems. I need the court's help.

The Court: Thank you. Mr. Dann.

Does anyone else care to be heard?

Mr. Rosenbaum: Under the circumstances, your Honor, if I may, I think I should like to address myself to the court at this time.

As a member of the same law firm of which Mr. Dann is a partner, I think I owe it to the court at this time to say that I do not quarrel with some of the statements as they pertain to specific facts, but as to the interpretation thereof, I differ with him greatly.

If his statement is intended to cast any aspersions on co-counsel, I, on behalf of all the other partners of my firm

except Mr. Dann, categorically deny the same, and let the facts speak for themselves. I think it was Bacon, in one of the very famous essays, who started out his essay on truth with the question "What is truth? said the jesting Pilate; would not stay for an answer".

I am very sympathetic with Mr. Dann, having lived with this case now for several years, and having also been a member of the same firm, working morning, noon and night, and sometimes on Sundays. I can see how he has been deeply hurt by the misconstruction that has been placed on his activities throughout these proceedings and prior thereto, and especially through press releases, for which the court, of course, has no responsibility.

I think at this particular juncture I should say that the interpretation on facts as to what is truth, what is evidence, what is information, are areas that not only involve semantics but the exercise of judgment in a legal sense in the highest sense of the term.

In that regard, I should like to say to your Honor that I think that Mr. Dann's testimony is not impugned by anything he said here today. I am now alluding to the testimony which he gave during these hearings. He sat through a goodly part of these hearings just as I sat through a goodly part of these hearings. Insofar as the emphasis which may be placed on the exercise of judgment in eliciting facts on depositions, there is always a very troublesome area. Many lawyers take the position that without knowing precisely what the answer is going to be, the questions, perhaps, are better not put. That, of course, applies primarily on trial of the issues *per se*. On depositions for discovery, again, there is that realm of personal opinion, and the judgment of the lawyer who is exercising that opinion.

I, for one, had nothing to do with the taking of any of the depositions that were taken by our co-counsel. However, I have no reason to think that they did not exercise good judgment and good faith throughout.

I think Mr. Dann is primarily concerned about whether or not the charges which have been made about him and to him can be adequately disproved. He feels, apparently, helpless at the moment.

I met with co-counsel for plaintiffs this morning. That is, co-counsel for plaintiffs Dann and Horvath. I still speak for Karl Horvath. At this particular juncture, Mr. Dann, although as a member of our firm, is also a party litigant, and I think on that score, as I have frequently told him and told our co-counsel, I think he has the prerogative of speaking for himself whereve: there is a variance of judgment or opinion. Suffice it to say at this particular moment I think that this court can render full and complete justice, as I read the court's opinion at this particular time, by making adequate provision for the development and elaboration of the information which Mr. Dann deems to be so highly important in order to fully apprise the Chancellor. I met this morning with Messrs. Dabney, Willard, and Clarence Taylor with reference to what I deem to be an order which would not only protect the integrity of the court and of the plaintiffs and give ample opportunity to Mr. Dann to be able to answer those who have accused him of having sold out, or having gotten money under the table. I think that at this particular point my statement should convey exactly the feeling of my firm, the firm that goes under the title of Dann, Rosenbaum, Bloom and Kaufman, other than Mr. Sol Dann, who has spoken for himself to your Honor. I believe that as your Honor will review the entire record, you will find that on many occasions it is

completely true, as Mr. Dann has alleged, that I have differed vastly with our co-counsel. However, in any type of organization where there is collaboration from the standpoint of working in concert, it is necessary to have a *modus operandi*. We had agreed at the outset that the majority of the firm's opinions would govern, and based on that rule, and abiding by that criteria, I frequently yielded in areas where I thought that better judgment dictated steps otherwise.

However, I think it is highly important to point out that in no instance would I or other members of my firm infer or conclude by being outvoted that it was due to bad motives, and I think with that statement I shall let the record rest at this time, your Honor.

The Court: One question. You have no reason to believe that anybody did anything other than his professional best in bringing this matter before the court?

Mr. Rosenbaum: That is my opinion, your Honor, and that is the opinion of the other partners in my firm other than Mr. Dann.

The Court: Thank you very much.

Mr. Dann: Let me ask you one thing before——

The Court: You will have the opportunity. I am going to hear everyone who wants to respond now.

Does anyone else care to be heard?

Mr. Dabney: I have given heed to the court's statement that this is not a trial, but certain statements which appear to tend to impugn the professional integrity of some of the plaintiffs' counsel have been made. If your Honor is going to give any weight whatsoever to any of those unsupported statements, perhaps we should reply. If your Honor is going to disregard them until further proof is in, I think there is no occasion to reply.

The Court: You would give the same answer to the question that I just posed, right?

Mr. Dabney: Yes.

The Court: Does anyone else care to be heard? I think, in a sense, this impliedly affects you, Mr. Morris. I don't know whether you care to be heard on this at all. There was a suggestion that the depositions did not adequately explore the areas involved. I take it you and your associate were involved in the taking of those depositions.

Mr. Morris: I was present, may it please the court, at the deposition of—I don't remember if Mr. Miller was with me—Mr. Dabney.

Mr. Miller: It was my deposition of Mr. Dabney.

The Court: I am talking about before the settlement was presented to the court.

Mr. Morris: I was not present.

Mr. Nemser: Your Honor, I think you are referring to my participation out of my firm.

I am very happy to answer your Honor's inquiry by saying, as I have repeatedly, that the depositions were well taken, were thoroughly taken, and were properly taken in all respects.

I do believe, if I may just go on for a second or two, I think we are re-exploring territory that has already been thoroughly explored both at the hearing and at various encounters before the hearing.

If I might, in order to correct a statement that Mr. Dann made when he said he invited me out to Detroit to examine his documents, I may say that Mr. Dann invited me out to Detroit after I had served upon him a notice to produce them here in Wilmington. They were subsequently produced in Wilmington, as your Honor knows, and they were

thoroughly examined here, and a report given to the court upon which we stand and will forever stand.

The Court: Does anyone else care to be heard?

Mr. Corroon: Yes, your Honor.

I participated in all but two of the fifteen deposition sessions. I participated in the sessions leading up to the execution of the stipulation of settlement and in the preparation of the notice.

So far as I am concerned, I will represent to the court that I saw nothing on the part of Mr. Dann's co-counsel that indicated that they were not trying to represent their clients to the best of their ability.

The Court: Some suggestion was made that there might be some consideration passing other than that set forth in the notice of settlement. Do you want to speak to that?

Mr. Corroon: There is none such, your Honor.

The Court: I assume the other defendants' counsel will make a similar representation? Mr. Richards?

Mr. Richards: Yes, sir.

Mr. Arsht: Yes, sir.

Mr. Herrmann: Yes, sir, I subscribe to that.

The Court: Mr. England?

Mr. England: Yes, sir.

The Court: I assume the other defendants' counsel will similarly subscribe to that.

Does anyone else care to be heard?

All right, Mr. Dann.

Mr. Dann: Your Honor, I would like to hand the stenographer a letter written by Mr. Rosenbaum under date of January 30, 1964, to all co-counsel. Needless to say, I don't want to comment upon the statements made by him here. I have been placed in a horrible position, but I don't sell out that—I withdraw that.

I would merely like to have Mr. Keller and Sam Keller return here, or I would like to take his deposition in reference to the information in my files and let your Honor see whether those men were examined with the intensity even to support a stockholders' settlement.

The Court: Is this the gentleman who testified at the hearing that you are referring to?

Mr. Dann: He was one of the gentlemen who testified.

The Court: Did you happen to hear his testimony at the hearing, Mr. Dann?

Mr. Dann: I heard part of it because I was mostly at the hotel, as your Honor may recall.

I realize the consequences to my firm but I have made every conceivable sacrifice to be an officer of this court, and I am surprised.

The Court: Anything further?

I construe this as an informal application to in effect repudiate the settlement on the ground that it was not arrived at in good faith. There is nothing in the present record which justifies that, or in the showing made here today, unless Mr. Dann himself is willing to repudiate his own testimony, because I made a great point of attempting to have that made clear in view of the conflict that arose over the representations in the notice. I was very alert to this problem, and I am sure the objectors were also alert to the problem.

So that based on the entire record here, there is nothing to justify reopening the settlement hearing, and I adhere to the opinion filed.

Mr. Dann: May I make one statement with reference to that, your Honor.

At the time that I was previously testifying I was assured that your Honor would have all of the information

before you before any of these defendants would be released, or there would be a final approval. Inasmuch as it now appears from some of the orders presented that I was mistaken or misled, I certainly can't go along with any approval of this settlement that would release all of these defendants before your Honor has had an opportunity to hear all the testimony. And if your Honor construes my statement as a repudiation of my previous testimony, although I don't consider it as such in view of my explanation, then you may so consider it.

But I certainly can't go along under these circumstances with this kind of a settlement arrangement, and certainly object to it.

The Court: Thank you, Mr. Dann. The objection is overruled. I do not consider that you have impugned any material part of your prior testimony by what you have said. The ruling stands.

* * *

Excerpts From Transcript of Hearing of February 24, 1964

[10-13] Mr. Bader: May it please the court, my name is Walton Bader. I was admitted pro hac vice previously in behalf of the objector Hoffman.

I did appoint local counsel after I received the papers on behalf of Mr. Dann, which indicates at least in my opinion a substantial question as to whether or not this entire settlement may not have been collusively arrived at between Dann and the Chrysler Corporation.

Dann has made very serious charges in his papers——

The Court. Just a minute. What was it you said, between Dann and Chrysler Corporation?

Mr. Bader: Yes your Honor. I don't have any evidence of that other than what Dann says. The only reason that that came to my attention was when Dann submitted this long petition, which has got some very serious charges in there, including statements that this matter should be referred to the Bar Association, to the Grand Jury, and to various other things.

Your Honor can understand that at this point I certainly cannot make such charges. All I know is what I have in the papers. I have no independent knowledge. But it seems to me that where serious matters of this kind have been brought up, that at least the matter should be investigated.

On behalf of the objector Hoffman I am willing at my own expense to take the deposition of Mr. Dann, to take the deposition of Chrysler, take the deposition of the corporate defendants and the individual defendants, and after 90 days be in a position to be able to inform this court, based upon what I have found in connection with these depositions, what the facts are.

At that point I would request the court either to intervene as a party plaintiff and pursue the litigation, asking the court to set aside the settlement in view of the facts involved, or in the alternative to impose further conditions on the settlement, or in the alternative to inform the court my depositions have shown nothing, and the settlement then can go forward as the court has previously advised.

But it seems to me that where charges of this magnitude and of this serious nature are made, that at least some opportunity ought to be given to investigate.

I can appreciate the court's position with respect to Mr. Dann. Mr. Dann, of course, is not in the same position as my client is. Mr. Dann participated in the settlement negotiations, and if in fact something improper was done Mr. Dann was a party to it and under those circumstances may not be heard to complain that he now doesn't like the result that has been accomplished.

But at the same time this court must consider the interests of Chrysler stockholders, and the interests of Chrysler stockholders are paramount.

The position of the objector Hoffman, of course, is not the position of the plaintiff Dann, and under these circumstances, your Honor, it seems to me that the 90-day extension would give me an opportunity to investigate the facts.

Now, I am willing to start the depositions tomorrow morning if your Honor gives me that permission, and continue those depositions to a conclusion as expeditiously and as rapidly as I know how.

I would also like to mention something else to the court.

The Court: What area do you propose to cover by these depositions?

Mr. Bader: Basically the area of Mr. Dann's charges. Mr. Dann has submitted a lengthy memorandum wherein he states that various important matters were not brought to the court's attention in connection with this settlement, which would indicate that the settlement was unfair and inequitable to the stockholders. That is basically the area that I intend to cover.

* * *

Mr. Corroon:

* * *

[15-22] Now, with respect to Mr. Bader's application, your Honor will recall that Mr. Bader attended one day of a hearing before your Honor and thereafter never saw fit to set foot in this court until today. He had the opportunity to participate in the rather lengthy hearings that were held last May. He did not see fit to do so. The matters that Mr. Dann refers to, many, many of them are matters that were covered by the allegations of the complaint, and Mr. Bader was able, if he had so wished, to cross-examine the witnesses that we put on the stand last May. He was so little interested in the matter that he never showed up.

So I submit that Mr. Bader's application is also much, much too late.

What your Honor may wish to do about the Dann application I do not know, but I suggest that Mr. Bader's application is on even a weaker footing than the Dann application because he frankly suggests that he doesn't know anything except what Mr. Dann has written.

The Court: Anything further? Mr. Miller?

Mr. Miller: Your Honor, I would like to make more or less a statement for the record.

I have received two telegrams from Sol Dann, and various letters, referring to the things which I think Mr. Bader was referring to. I think I should state for the record that if Mr. Dann produces any evidence of fraud or collusion, I will certainly go forward on the basis of whatever is produced.

But as I read the memorandum submitted by him, and the attachments to it, and as I reread his testimony in the trial this morning, most of what I see is innuendo, or charge, but apparently nothing is forthcoming with which to back up the innuendo or charge.

If he comes forward with the evidence which presumably he would have come forward with prior to now if he had it, I am glad to go forward on behalf of the position he takes, but not otherwise.

The Court: I think implicit, if not explicit, in what he has said is that the objectors didn't go as far as they should have.

Mr. Miller: I think that is implicit in it, yes, sir.

The Court: What is your response to that? Mr. Miller? You were the chief counsel for the objectors.

Mr. Miller: My response is that if he produces anything of a tangible nature, we will take it up either as newly discovered evidence or otherwise.

The Court: Actually, the material here largely was involved, was it not, at the settlement hearing itself because of his attempted repudiation of the notice.

Mr. Miller: Yes, sir. I think that insofar as the merits of the causes of action are concerned, that that was covered at the settlement. The other matters that were not covered at the settlement are his charges of wrongdoing on the part of counsel.

Excerpts From Transcript of Hearing of February 24, 1964

The Court: So the only thing that could be said to be open that at least you were not alert to is the charge of an alleged conspiracy by his attorneys, is that right?

Mr. Miller: That is true.

The Court: Did you yourself, or one of the other counsel, examine the documents that Mr. Dann had?

Mr. Nemser: That is correct, your Honor.

Mr. Miller: They were open for examination. Actually he was a witness and could have referred to any document that he wished to.

Mr. Corroon: Your Honor, Mr. Stanley Nemser, Judge Herrmann, Keith Jenkins, who testified in the proceedings, and a partner of Mr. Ehrenbard's, all examined those documents. I think Mr. Hendelman examined some of them.

Mr. Miller: I have had the opportunity to examine them, your Honor, but I wanted them here so that he could have them available in connection with his testimony.

The Court: Thank you.

Mr. Nemser?

Mr. Nemser: If your Honor please, to answer an inquiry made by Mr. Corroon, I have a record of this action here with me and I find that Mr. Newberg did appear in our action, and that was done in March of 1962. Subsequently, Prickett & Prickett made a motion in our action for leave to withdraw as his counsel, and that was granted.

Turning now to the matter of the Dann documents, your Honor, they were quite the subject of review during the settlement proceedings before this court, and a report was made to your Honor on them. Among others who were offered an opportunity to examine these documents were Mr. Bader, and Mr. Bader did not see fit at that time to take advantage of the invitation to recall the precise means by which the invitation emerged, your Honor.

We had requested the production of the documents in connection with a deposition that we planned to take of Mr. Dann. Our application was funneled into the production of documents. Mr. Dann produced a great and a large array of documents, and they were here in this courtroom on a table, if your Honor will recall.

The Court: Yes.

Mr. Nemser: We claimed a first right, since we had made the first application for the production, to examine the documents, and we started to examine them midway on the first day we came into court, and said that they were such a large number and since we all should like to see a disposition of the matter of the Dann documents during the course of the settlement hearing, rather than continue to claim any right of first examination we surrendered that and threw open the examination of these documents to all counsel, including counsel for all objectors, including Mr. Bader.

As I remember it, Mr. Handelman was the only one representing the objectors who came to the examination of documents, and he was there for a very short period.

My brother, to a major extent, and I to a much smaller extent, reviewed all of these documents during laborious sessions, and we made our report to this court. We were accompanied during all of our examination, while our examination continued as I recall for a longer period than theirs, by Judge Herrmann and by representatives of the other defendants, and the corporation.

I view it in this fashion, your Honor. I believe that much of what Mr. Dann now brings forth, or tries to bring forth, is what he has from time to time attempted to bring forth to stop the proceedings, as it were, in midstream.

We might have, as a new element in the picture, a charge of collusion which has been lodged against his own counsel in relation to the counsel for the Chrysler Corporation.

Again, however, Mr. Dann ignores the fact that there is a Gallo action which is separate and independent from the Dann action, that there are counsel for the Gallo plaintiffs who have at various stages of this proceeding taken a dramatically independent position from the Dann group, and no charges of collusion have been leveled against us. They cannot be leveled against us. And we say again, your Honor, as we have previously, that the settlement in our opinion is fair and reasonable and ought to be approved by this court.

The Court: Speaking of the settlement negotiations. I assume you were involved in those at all material times, is that right?

Mr. Nemser: Except for the matter concerned with the fee to Mr. Cobin.

The Court: Except for that matter, which you excluded, I think, at the hearing itself, when you mentioned your position.

Mr. Nemser: That's correct. And also during the negotiations, if your Honor will recall. We withdrew from it. At all other times we were there.

The Court: I ask you, like we ask a member of the board of directors, whether he was dominated or not. But solely for the record, is there anything that you have to suggest that the settlement negotiations were anything but at arms' length throughout?

Mr. Nemser: Nothing whatsoever, your Honor. They were certainly at arms' length as far as we know from the

moment that we came into the matter until the matter was submitted to the court at the hearing, and since that time.

The Court: Is there anything you know about it that would tend to suggest that the various causes of action had any more evidence to support them than the court had to consider when it filed its opinion?

Mr. Nemser: No, your Honor.

The Court: That's all; thank you.

Does anyone else care to be heard?

Mr. Bader: May it please your Honor, I would just like to say one thing in respect to what Mr. Corroon said about my appearances at the various hearings. Of course, Mr. Corroon is absolutely correct in what he stated.

The reasons why I did not appear at any hearings is Mr. Miller, who was appointed by your Honor, was so competent in handling the matter that basically all it would have meant if I had been here was going over the same grounds as Mr. Miller. The only time it became important was when these allegations of fraud and collusion were made by Mr. Dann, and these were made extremely recently. That is the reason why I did not appear at any of the prior hearings.

* * *

[28-30] The Court: Mr. Dann picked out a date in March for our notice without any consultation with the Court, so I don't feel bound to consider that date that he noticed that particular matter for.

All the matters that he relies upon are, I assume, set forth in the various communications which I have received, and by that I don't mean the underlying material which he claims is in his files. But I have read carefully all the material which he sent me, including the communications with counsel.

I think the best that can be said for his case is that if explored he might be able to obtain some admissible evidence concerning some of the causes of action.

As I understand it, in substance he has done no more than state what he stated on the witness stand at the hearing on the settlement, except now he accuses counsel somehow of a conspiracy.

The Court took this into consideration in determining what witnesses should be examined at that hearing because this very point was in the Court's mind in view of the attempt by Mr. Dann to repudiate the notice of the hearing on the settlement.

In fixing the list of witnesses to be examined, in determining the scope of the discovery permissible to the objectors, the Court was very conscious of the claim that somehow this was not a settlement fairly arrived at. If one will read my opinion on the settlement, he will see that I recognized this very problem therein. It tailored the discovery to meet some such possible accusation.

From all that I have seen that has been produced here, and I consider only Mr. Dann because Mr. Bader has no knowledge of his own but relies merely on what Mr. Dann is saying, and leaving out any fee overtones that might be involved in any aspect of this matter, it is my conclusion that at best Mr. Dann would only hope to be able to turn up something if there were further discovery permitted.

We are not dealing here with a trial of the case but a settlement of a lawsuit. So that I think that my prior decision on discovery will dispose of the matters which Mr. Dann has raised.

To the extent he makes accusations against his counsel, let me just say that I approached the determination of the settlement by setting aside any consideration in particular

of the original plaintiffs having negotiated the settlement, and looked at it primarily from the point of view of the case made by the objectors, in order to obviate, to the extent I could, any concern about the fact that this settlement was negotiated in a context that could be considered as being an undesirable one.

But all this has been pointed out in my prior opinion. I was satisfied that the settlement was fair and should be approved after adopting that particular approach and excluding the weaknesses in the way the settlement was arrived at.

Naturally, the Court cannot decide on this record what motivations the original counsel had when they negotiated the settlement. I don't propose to do that. All I can say is that feeling as I do, a great responsibility to see that the settlement is only approved if it is fair and in good faith, I have found nothing in the matters presented to me which would justify further hearings or modification of this settlement.

So I rule that all petitions that seek an extension of time for the purpose of investigating the propriety of the settlement should be denied, and to the extent that it is necessary to add any language to your order as proposed, Mr. Carroon, I will be glad to have it added in order to accomplish that purpose.

* * *

[54-55] Mr. Bader: May it please your Honor, in going over my motion subsequent to your Honor's ruling, there was a part of the application where I asked for leave to intervene. I don't think that is necessary in view of the fact that I am an objector, but I don't presume that your Honor is denying that part of the motion, or is your Honor not passing on it in view of the rulings that your Honor has made?

The Court: You may formalize it, unless there is objection solely for the purposes of objecting to the settlement, as I understand it. You may formalize it because there is a Supreme Court decision stating in effect that an objector is an intervenor.

Mr. Bader: I knew about that decision, your Honor. I so put it in my papers. But I thought we might formalize the matter just so there wouldn't be any doubt.

The Court: Any objection?

Mr. Corroon: If Mr. Bader thinks he gets any advantage out of it, your Honor, I do object.

Mr. Bader: Well, I would like to make that application, your Honor, for your Honor's ruling.

The Court: I will grant the application. You may present an appropriate order. We understand, however, the intervention is solely for the purpose of objecting to the fairness of the settlement, and the order should so provide. I believe there are prior orders in the file so circumscribed.

Mr. Bader: I will put the condition in, your Honor. I am getting a copy of the minutes, your Honor.

* * *

Decisions of the Court of Chancery

On Approval of Settlement (December 31, 1963)

SEITZ, Chancellor:

This is the decision after hearing on the fairness of a proposed settlement of two derivative actions.

The first action was commenced by one Sol A. Dann and other stockholders against Chrysler Corporation ("Chrysler"), various directors and officers as well as certain suppliers of Chrysler. This action will be referred to as the "Dann action".

The Dann action was commenced in August 1960, and involved some twelve causes of action. After certain pleading skirmishes (See Dann v. Chrysler Corp., Del. Ch., 166 A.2d 431, 174 A.2d 696), a consolidated amended complaint was filed consisting of some 109 pages embracing fifteen causes of action and about sixty separate claims. Certain of the defendants thereafter served their renewed motions to dismiss or in the alternative for a more definite statement. The so-called Keller defendants served their motion to dismiss or for summary judgment. The defendant John W. Minor and the defendant NAFI Corporation (the only appearing supplier) filed answers denying the charges asserted against them. The defendant Robert P. Laughna filed a motion to strike and to dismiss parts of the complaint.

All the motions to dismiss were based largely on the contention that the plaintiffs could not amend their complaint so as to assert new causes of action as to those nonresident defendants who had appeared generally following the sequestration of their property. Certain motions also questioned whether the allegations were set forth with sufficient particularity. The Keller defendants raised the defense of statute of limitations.

In February 1962, Mary and James Gallo filed a derivative action against Chrysler and the then directors and certain past officers of Chrysler charging many of the same acts, omissions, and "frauds" as were alleged in the Dann complaint.

In June 1962, this court entered an order consolidating the Dann and Gallo actions solely for the purpose of discussing a possible settlement. The time fixed was subsequently extended at the request of the parties.

In the meantime (between 1960 and March 1963), four stockholder actions were commenced outside the State of Delaware embracing some of the same causes of action—two in the New York Supreme Court, one in the Federal District Court for the Southern District of New York and one in the Federal District Court for the Eastern District of Michigan. Also, Chrysler commenced a libel action against Dann in the Delaware Superior Court.

On March 6, 1963, a stipulation of settlement was filed. To facilitate the settlement a final amendment was filed by the Dann plaintiffs adding two additional causes of action which, it is suggested, incorporate the additional charges found in the New York and Michigan actions. The stipulation of settlement provides, inter alia, that all the derivative actions shall be dismissed with prejudice against all the defendants except the defendant W. C. Newberg. As to Newberg the dismissal will be without prejudice. Such fees and disbursements as the court may allow to plaintiffs shall be paid by Chrysler.

Under the terms of the stipulation of settlement, if approved, each of the individual defendants who is a party to the stipulation and all past or present directors of Chrysler, except the defendant Newberg, will receive a release

discharging each of them from any and all claims arising out of the matters alleged in the complaint and all amendments thereto both in the actions brought in this court and the "companion" actions in the New York state and federal courts. Also, the individual defendants who are parties to the stipulation will seek indemnity for their attorneys' fees incurred in connection with these actions.

On March 6, 1963, a court-approved notice of hearing on the stipulation of settlement was mailed to all stockholders. A proxy statement was simultaneously transmitted to the stockholders proposing the adoption of a modification in Chrysler's incentive compensation plan. The following language is contained therein:

> "Since the modification of the formula for computing the total provision that may be made for incentive compensation awards is a principal term of settlement and is necessary if the settlement is to be put into effect, a vote in favor of amending the 1956 stockholders' resolution to change the incentive compensation formula will, in effect, be a vote in favor of the settlement."

At a special meeting of the stockholders held on April 16, 1963, out of a total of 9,083,502 shares outstanding and entitled to vote, 6,699,016 shares were voted in favor of and 144,240 against the proposed modification.

The court also appointed an amicus to report, inter alia on "What appear to be the issues relevant to the hearing on the proposed settlement and the proof which might be of assistance to the court". This elaborate and helpful report was filed and was made available to all interested parties before the hearing. In particular, it discussed and

analyzed the evidence of record relevant to the various issues and suggested other areas which might need elaboration.

Several stockholders filed objections, and the matter was tried at some length. The objecting stockholders are identified collectively herein as "objectors", unless more particular identification is desirable.

This is the decision on the "fairness of the settlement" after hearing and elaborate briefing.

Before the specific issues are considered, a little background is in order. Chrysler, a Delaware corporation, employs directly or through its subsidiaries in the United States approximately 77,000 people. It manufactures and sells passenger automobiles and commercial cars and trucks both here and abroad. It is the third largest manufacturer of such vehicles in the United States. It also manufactures assorted products of some substance including defense materials.

I turn now to the terms of the settlement and their relationship to the causes asserted.

The "consideration" offered in exchange for the releases and dismissal of the causes of action is a modification of Chrysler's present incentive compensation plan for its employees. The details of the present plan and the proposed changes are discussed more fully later herein. The Dann plaintiffs' attorneys also urge that the changes in Chrysler's management personnel (referred to later herein as a "change in management") which occurred both prior to and during the pendency of these suits, are attributable to the activities of the plaintiffs or their attorneys. They contend that such changes effectuated one of the principal purposes of the litigation and that they pro-

vide in and of themselves a sufficient basis for approving the settlement.

The proponents agreed that the stipulation of settlement and the proposed modification of the present incentive compensation plan should not become operative until the modification was approved by Chrysler's board and by its stockholders and final approval of the settlement was granted by this court. Final settlement was also conditioned upon dismissal of the lawsuit instituted by Dann in the Federal District Court in Michigan against Chrysler and the giving of mutual releases between Dann and Chrysler of claims and counterclaims involved in the libel action filed by Chrysler against Dann in the Superior Court in Delaware plus the payment of $20,000 and disbursements to Dann's separate counsel therein.

In the stipulation all the named defendants (except Newberg) deny liability under any of the causes of action but agree that the expense of further litigation and the probable expenditure of time on the part of Chrysler's employees, officers, and directors make it desirable that the litigation be terminated without further proceedings. Plaintiffs state that the "significant and steady progress in all phases of Chrysler's operations under new management * * * with the estimated benefits which will flow to Chrysler and its stockholders by reason of the amendment to the Incentive Compensation Plan" can be considered an achievement of the objectives of the litigation. Thus, they state that they believe that settlement on the proposed terms is much to be preferred to continuation of the litigation and is in the best interests of Chrysler and its stockholders.

In the court-ordered notice of hearing which was sent to the stockholders, plaintiffs' attorneys made certain rep-

resentations with respect to plaintiffs' ability to recover on the alleged causes of action. These causes of action were divided by them into three categories: "(1) charges that certain past and present directors and/or officers of Chrysler have been financially interested in Chrysler suppliers and have personally profited from transactions between Chrysler and suppliers; (2) charges of mismanagement by defendants as directors and officers of Chrysler during the years 1956 to 1961; and (3) charges relating to the Incentive Compensation and Stock Option plans of Chrysler including allegations that they were not soundly devised and provided rewards out of proportion to the performance required to gain the rewards and should be appropriately revised."

Plaintiffs' attorneys further stated in the notice that while they felt that inquiry into the alleged instances of wrongdoing was warranted, they had concluded that the evidence gathered did not sustain the charges of personal interest and personal profits on the part of the defendants, except in a few instances discussed in the notice, and would not permit successful prosecution of the charges. Next, plaintiffs' attorneys acknowledged that the charges of mismanagement against the named defendants lay primarily in the area of business judgment and that the burden of proving culpability was too great to promise success in the prosecution of such charges.

Plaintiffs' attorneys stated finally that they believed their complaint concerning the "fairness" of the incentive compensation plan was well grounded and that a revision in such plan in accordance with their suggestions should be made. The revision or modification negotiated by plaintiffs' attorneys with the directors of Chrysler is said to

meet these "suggestions" in that no compensation may be awarded under the new plan until higher earnings are achieved by the corporation but a higher rate of participation is permitted once these higher levels of earnings are achieved. As to the stock option plan, plaintiffs' attorneys noted that the directors of Chrysler had already made certain changes therein.

The proponents of the settlement all contend that the agreed terms are fair and beneficial to Chrysler and ought to receive the approval of the court. The defendants, however, deny that the change in Chrysler's management and the "changes and improvements in Chrysler which have occurred subsequent to commencement of the activities of plaintiffs" are, as contended by plaintiffs' attorneys, attributable to the plaintiffs.

The objectors who have formally appeared herein take the position that the court should refuse to approve the proposed settlement on the ground that it is "unfair" to Chrysler's stockholders. The heart of their contention is that in practical effect Chrysler will receive nothing of tangible benefit as a result of the settlement, and indeed may be giving up a present advantage, while in return it will be required to deliver a release from all further liability to each of the named individual defendants except Newberg. Except for the objector Ezzes (and perhaps Koenigsberg as later considered), the objectors do not urge that there is in fact merit in any of the causes of action set forth in the amended complaints sufficient to permit a recovery thereon. Thus, they do not suggest that the "consideration" offered in return for the releases is "inadequate". Rather they contend that the proposed modification of the incentive compensation plan is merely a device agreed upon by the proponents by which the defend-

ants may avoid what plaintiffs' attorneys are said virtually to concede are worthless claims. Thus, in the view of the objectors, the proposed settlement will have the effect, inter alia, of committing the corporation to a radical change in its incentive compensation arrangement, such change having resulted not from an untrammelled exercise of discretion on the part of the directors and stockholders but from the necessity of finding a basis for settling the lawsuit.

A further and separate objection they say is the fact that the proposed modification of the incentive compensation plan, if instituted, will result in the authorization of greater dollar payments to Chrysler's employees under such plan than are presently permitted. Thus, they contend, no "benefit" can assuredly be said to pass to Chrysler as a result of the proposed settlement beyond the termination of the existing lawsuits with the consequent elimination of express and unfavorable publicity and an end to the distraction of Chrysler personnel from their corporate duties.

Parenthetically, defendants' attorneys meet these objections to the settlement head on. They of course agree that the claims are worthless, and they concede that the modification of the incentive compensation plan if approved will authorize larger payments to Chrysler executives, a number of whom are defendants herein, if the requisite earnings exist. They admit that Chrysler's directors were anxious to terminate the litigation in order to avoid further expense and embarrassment to the corporation and "were willing to consider any honorable and proper way to get these suits out of the way".

They contend, however, that as a practical matter the corporation has nothing to gain from a continuation of the

litigation and that it faces the prospect of further losses in time, good will, and expense. They urge that the modified incentive compensation plan will be an improvement over the old plan, since net earnings will have to be higher before the beneficiaries become entitled to the same dollar amounts of compensation as they would have been under the existing plan.

The defendants consider immaterial the fact that a number of them will be in a position to receive a greater dollar amount of incentive compensation for the year 1963 under the proposed plan than under the old plan. This they say is the result of Chrysler's financial success in the 1963 fiscal year and merely fulfills the purpose of the modified plan to give greater rewards for greater corporate success. They emphasize the fact that the stockholders as well as the directors approved the modification after being explicitly informed that approval was a vote in favor of the proposed settlement. Defendants' attorneys urge that even if there is doubt that the modified incentive compensation plan is better than the old plan, still the court should approve the settlement since the interests of Chrysler can best be served by terminating the litigation.

Should the court approve the settlement on the basis of the terms agreed upon by the proponents and approved in effect by the holders of a vast majority of the stock by virtue of their affirmative vote on the modification of the existing incentive compensation plan?

I should note preliminarily that the objector Ezzes charges that the 1963 proxy statement was tainted with fraud. This charge is based on the claim that the statement did not adequately or fully describe the nature of the claims and the effect of the proposed settlement. I find no merit to these charges.

Unlike the other objectors, Ezzes alone claims that there is in fact merit in many of the causes of action asserted in the Dann and Gallo complaints. He contends that the proposed settlement should not be approved by the court, because the consideration offered by the defendants in exchange for releases is wholly inadequate in view of the potential recovery by the corporation.

Before dealing with specific objections it would seem desirable to mention the record which is used as the basis for deciding this matter. The plaintiffs agreed to the terms of the settlement on the condition that they be permitted to have reasonable discovery so as to make a judgment as to whether the other claims had sufficient merit to negate the fairness of the proposed settlement. Rather elaborate discovery was undertaken. It resulted in the representation by plaintiffs in the notice to stockholders of the proposed settlement that except for the incentive compensation plan cause of action the other causes could not be successfully pursued. It is obvious, with all due regard for the integrity of counsel, that the approach taken is, at a minimum, subject to the possibility of real abuse. The court took this into consideration in passing upon the objectors' requests for further discovery. In addition the court gave counsel for the various objectors an opportunity at the hearing to interrogate certain of the knowledgeable defendants and other witnesses whom the court required to appear for the purpose of testifying to a number of these matters. I have concluded that the record is sufficient for present purposes.

The objector Ezzes claims that a number of the causes of action have merit. He so contends with respect to alleged frauds on the part of Chrysler's management in ad-

ministering Chrysler's incentive compensation plan. Strictly speaking, a number of these allegedly valid claims do not fall within the confines of the incentive compensation causes of action asserted in the Dann and Gallo complaints. The notice to the stockholders of the hearing on the settlement contains the following language:

> "In plaintiffs' discovery proceedings herein, the documents relating to the incentive compensation plan were marked as exhibits. In view of their examination into their charges against individual officers and employees of Chrysler, plaintiffs' attorneys have concluded that although there is an issue as to fairness of the existing plan, there was no invalidity in its adoption, or impropriety in the application of or calculations under the plan or any improper award of benefits thereunder except for any possible claim that Chrysler may have against Newberg. Pursuant to the stipulation of settlement of these actions, a modification of the plan as hereinafter more fully described, negotiated by plaintiffs' attorneys, will be submitted for stockholder approval."

I propose to resolve any doubt by treating each of the allegedly valid causes of action asserted by the objector as if they fell within the confines of the allegations of the complaints. I note in passing that of all the claims originally asserted by the plaintiffs only the issue as to the "fairness" of the existing (1956) plan is said to have merit in connection with the defendants who join in the settlement proposal. I observe further that nowhere in the notice to stockholders or in plaintiffs' briefs is the precise nature of the alleged unfairness in the plan spelled out.

Three of the Ezzes objections are directed toward allegedly improper practices under the 1929 Chrysler incentive compensation plan and the allegedly fraudulent adoption of the 1956 plan.

The history of Chrysler's incentive compensation plan, commencing in 1929, forms the background for these contentions of the objector. On April 16, 1929, Chrysler stockholders authorized the payment of incentive compensation in the following language:

> "This corporation may incur obligations on account of such profit sharing plans and bonus plans, provided said expenditures for any calendar year * * * shall not exceed for said year six and one half percent (6½%)[1] of the *net earnings of the Corporation for that year* * * *." (Emphasis added)

Computation of incentive compensation for the period 1929 to 1955 was governed by the 1929 resolution set out above, which provides for the application of a percentage figure to the "net earnings of the Corporation". The proponents of the settlement concede that from 1929 to 1939 the "net earnings" against which the percentage was applied was a consolidation of the earnings of Chrysler and all wholly-owned subsidiaries, domestic, Canadian, and foreign. From 1940 to 1953, however, Canadian and other foreign subsidiaries were not consolidated for incentive compensation purposes. Beginning in 1954, Canadian and foreign subsidiaries were once against consolidated. A comprehensive revision of existing incentive compensation plans was effected by the stockholders' resolution of April 17, 1956, which remains in force at the present time. The pertinent language of that resolution follows:

[1]By resolution of the Board of Directors adopted February 23, 1941, this percentage was reduced to five per cent.

> "* * * this Corporation may incur obligations on account of Incentive Plans, provided the provision out of earnings for any fiscal year of the Corporation for all Incentive Plans then in effect * * * shall not exceed five per cent (5%) (as computed by the independent Auditors of the Corporation) of the *Consolidated Net Earnings for that fiscal year (as reported in the Annual Report to the stockholders) of the Corporation and such of its subsidiaries as are consolidated in its annual statements* * * *". (emphasis added)

The Ezzes objections on these matters are first that during the period 1929-1955, payments of incentive compensation were based on computations of consolidated net earnings when in fact they should have been based on the net earnings of Chrysler alone; next, that the 1956 stockholders' resolution relating to incentive compensation "changed" the basis for payments of such compensation to consolidated net earnings though the proxy statement failed to reveal that the 1929 formula did not permit consolidation; and finally, that during the period the 1929 formula was in force, the method of computation was improperly altered from time to time.

The defendants' answer to these objections is that the 1956 stockholders' resolution, as indicated in the proxy statement, merely restated the practices that had been adopted under the 1929 resolution and did not fundamentally change them although funded debt was added to the capital base. Thus, the following statement is found in the 1956 proxy statement: "The proposed amendment generally revises the resolution of 1929 so as to eliminate what has become obsolete and to adapt the language to

present-day accounting terminology". The defendants point out that the consolidation of wholly-owned subsidiaries for incentive compensation purposes, which is expressly authorized by the 1956 resolution, had always been Chrysler's practice though the 1929 formula only refers to "net earnings of the Corporation". Also, the earnings figures which have been used for incentive compensation purposes have been those shown in the annual reports to stockholders, though no reference is made in the 1929 resolution to annual reports of earnings.

The defendants say that foreign subsidiaries were not included in the consolidated financial statements in the annual reports to stockholders for the years 1940 through 1953, because of exchange restrictions and war-time conditions in foreign countries. They contend that this situation was explained to the stockholders in the annual report for the year 1940, although that report is not part of the hearing record. Thus, they urge that the practice of basing compensation on the financial statements appearing in the annual reports to stockholders was consistently followed throughout the period 1929 to 1955.

What assessment may be made of these supposed causes of action said to exist against some of the defendants herein? The court's responsibility at this stage is merely to evaluate the probability of success if these issues were ultimately litigated and not to make a final determination. Krinsky v. Helfand, 38 Del. Ch. 553, 156 A. 2d 90.

Turning then to the above contentions of the objector Ezzes, I am satisfied that the likelihood of success on any of these claims is very small. The defenses of laches or limitations might well be applicable to each of these claims.

Moreover, assuming that Chrysler reported its earnings to its stockholders on a consolidated basis prior to the institution of the 1929 plan, no valid objection could probably be raised to the interpretation of the language of the 1929 formula adopted by the persons charged with implementing such plan. A very similar situation is presented in Meyers v. Cowdin, Sup., 47 N.Y.S. 2d 471, where the New York court in dismissing the complaint after trial noted that the earnings of the corporation there involved had always been reported to the stockholders on a consolidated basis. It concluded therefore that payments of incentive compensation based on such consolidated earnings were not improper though the formula provided for payments based on "net earnings of the Company".

Next, I think that the objector's claim that the stockholders' resolution of 1956 was induced by fraud is without substance. It is conceded that incentive payments for the period 1929 to 1955 were based on the consolidated earnings of Chrysler and its wholly-owned subsidiaries as reported to the stockholders. It follows therefore that there was no misrepresentation or inadequate disclosure when the 1956 proxy statement stated that the purpose of the revision, which I find made no change of any real substance in the existing plan, was "to adapt the language to present-day accounting terminology".

Next, I turn to the objector's claim that the persons charged with implementing the plan improperly altered computation practices without regard for the language of the various stockholders' resolutions. I note first in evaluating this claim that there is no showing that the corporation or its stockholders were damaged by any of these alleged alterations.

The objector points principally to the exclusion of Chrysler's wholly-owned foreign subsidiaries from consolidated earnings during the period 1940 to 1953. The defendants claim, however, that the practice of excluding such subsidiaries and the reasons therefor were explained to the stockholders in the 1940 annual report and that such information was filed with the S. E. C. I am satisfied that little success could be anticipated if this issue were litigated, since payments during this period were admittedly based on consolidated net earnings as reported in the annual reports to stockholders. There is no showing whatever that the alteration in the method of consolidation violated sound accounting principles, nor does the objector refute defendants' assertion that the allegedly improper alteration was fully disclosed to the stockholders.

The objector claims that there were other improper alterations in computation practices with respect to wholly-owned retail selling and leasing subsidiaries and so-called forfeitures. These claims appear to be wholly without merit. I merely note in passing, first, that the allegedly improper treatment accorded forfeitures served to reduce rather than increase the fund available for incentive compensation and, next, that the earnings of the selling and leasing subsidiaries were consolidated, in effect, with the earnings of the other subsidiaries in the annual reports to stockholders.

The objector Ezzes next complains that payments in 1955, 1957, 1960, and 1962 were improper because the language of the plan was misinterpreted so as to inflate the fund available for incentive compensation payments. The first matter under this head concerns the inclusion of state and local income taxes in 1962 as part of the fund from which "set aside" was deducted. The 1956 plan expressly

permits the inclusion of "taxes on income". The objector contends, however, that the 1929 plan only permitted the inclusion of *federal* taxes on income and that the 1956 proxy statement implied the 1956 plan would continue on the same basis.

There are several reasons why in my opinion the probability of success on this issue is small. First, there is nothing in the 1956 proxy statement that can be said to constitute a representation that the phrase "taxes on income" in the 1956 plan was to have the same meaning as "Federal taxes" in the 1929 plan. The most that may be said is that the amended language introduced a potential ambiguity in view of the former practice. Certainly this was an area where those in charge of implementing the plan were entitled to exercise their sound discretion. Also, I note that in November 1962, inquiry with respect to the proper interpretation of the language of the plan was directed to legal counsel by Chrysler's auditors. In reply, it was specifically stated that the language here in issue included state and local as well as federal income taxes. Thus, considering the factors relevant to the proper interpretation of this language, I think the likelihood of recovery from any of the defendants of the alleged overpayments for the year 1962 would be remote.

The objector next raises objection to the interpretations of certain portions of the plan which are found in the reply by legal counsel to Chrysler's auditors. I pause here merely to note that the objector disagrees with such interpretations. However, he does not point to any specific instance where payments were based on these allegedly erroneous interpretations of the plan. Thus, assuming that he were correct, there is nothing on which a recovery by the corporation could be based. I add, however, in order to

avoid clouding this issue, that the interpretation placed on the language in issue by counsel seems fair and reasonable. I conclude therefore that prosecution of this claim would probably be fruitless.

The objector claims that the 1956 plan is invalid: (1) because incentive compensation can be based on non-operating income, (2) because loss years are not averaged with profitable years, (3) because the compensation percentage is applied to before-tax rather than after-tax earnings, and (4) because compensation is based on net earnings as reported to stockholders rather than net earnings as reported to the federal government for tax purposes. I can only say that no authority is cited which suggests that any one of these reasons per se renders the incentive compensation plan invalid. At bottom, these objections are directed to the form of plan which the directors and stockholders voted to adopt. It may well be that some plan other than the one adopted would better accomplish the objectives of an incentive plan. But that of course is not for this court to say. I am satisfied that the contentions of the objector under this head offer no legal basis for attacking the 1956 plan.

The objector Ezzes also contends that all stock options issued after 1956 were invalidly issued in violation of the stockholders' resolution of April 17, 1956. I think it clear that the limitations placed in the resolution authorizing payments under "Incentive Plans" have no bearing on the issuance of stock options and that such options were not invalidly issued. While a stock option plan may indeed be considered an incentive plan, it is readily apparent that the term "Incentive Plans" appearing in the 1956 proxy statement and stockholders' resolution was not intended to and did not refer to the Chrysler Stock Option Plan.

Next, the objector claims that the cancellation of certain options in 1958 and 1959 and their reissuance at lower option prices constituted a waste of assets for which the recipients are liable. The 1959 proxy statement makes it clear that the granting of the new options, conditioned upon surrender of the old, was undertaken by the Stock Option Committee of Chrysler which was composed of directors not eligible to receive options. Each of these new options could be exercised by the holder only if he remained continuously in the employ of Chrysler or its subsidiaries for at least eighteen months after the date of its grant. The action of the Stock Option Committee was approved by the Board of Directors and by the stockholders.

The objector contends that the reissuance of stock options at lower prices constitutes a gift or waste of assets, since the committee action was taken only when it was made clear that there would be a net loss in earnings during 1958 thereby depriving certain of the defendants of incentive compensation for 1958. He also contends, citing certain magazine and law review articles, that the reissuance of stock options at lower prices ought not be permitted, since such action in effect excuses poor corporate performance.

A number of Delaware decisions I think support the view that where stock options are granted by a disinterested committee with the approval of the directors, and stockholders and where the optionee is required to remain in the employ of the corporation for an extended period of time, no legal attack may successfully be made upon such options. See, e.g., Gottlieb v. Heyden Chemical Corporation, 33 Del. Ch. 177, 91 A. 2d 57; Beard v. Elster, (Del. Ch.), 160 A. 2d 731. One may have difficulty reconciling the practice of reissuing options at lower prices with the

"incentive" aspect of the earlier grants. Nevertheless, the court would not be inclined to block reasonable corporate action in this area, particularly in view of the need of corporations to retain talented personnel.

I conclude therefore that the probability of success if this issue were ultimately litigated would under the circumstances be small.

The objector next attacks the "revolving credit agreement" negotiated by Chrysler with a number of banks whereby Chrysler was extended a credit commitment of $150,000,000. The commitment was obtained on June 12, 1958 and was continued until May 15, 1961. Although Chrysler never used the revolving credit, it nevertheless paid the sum of $2,157,533 to the participating banks during the period the commitment remained in effect.

The objector contends that six members of the nine-member Finance Committee that recommended the commitment were officers and directors of participating banks. All the members were present on June 12, 1958 when the matter was voted upon, and all voted except R. E. McNeill, Jr., President of the Hanover Bank, who had been the primary negotiator of the transaction. The Board of Directors of Chrysler voted upon the commitment at its meeting held the same day. Eighteen of the twenty-one directors were present. Of these eighteen, eight were associated with banks ultimately participating, and all voted except McNeill who nevertheless was present.

Article II, Section 9 of Chrysler's By-Laws provides that no director shall vote at a meeting of the Board on a question in which he is interested (with certain exceptions not relevant here) or be present while the same is being considered. Section 9 goes on to apply the same safeguards where a transaction between Chrysler and another corpo-

ration is involved and a director of Chrysler is a director or officer of such other corporation. The same limitation appears to be applicable to action taken by any committee of the corporation.

The objector contends that the presence of the interested directors at the meetings of the Finance Committee and the Board violated Section 9 of the By-Laws. He claims that by virtue of his position on the Stock Option Committee and Incentive Compensation Committee, McNeill had a "persuasive effect" on the other directors in obtaining their approval of the commitment. Next, he claims that Chrysler's undertaking was reckless and without diligence, since admittedly there were no studies on the subject of the revolving credit agreement before the Finance Committee or the Board at the time it was approved or while it remained in effect, though Chrysler never used the credit but continued paying for the availability of such credit. The objector seems to suggest that even if the initial credit agreement in 1958 was warranted by the circumstances then prevailing, the subsequent improvement in Chrysler's Cash and Marketable Securities and Net Current Assets required reconsideration on the part of the Board. The objector attributes all these alleged wrongs resulting in payments by Chrysler of $2,157,533 over a three-year period to the conflict-of-interest situation in which certain of the directors found themselves.

The revolving credit agreement was the subject of the ninth Dann cause of action and the sixth Gallo cause of action. Much of the evidence relied upon by Ezzes in voicing his objection to the settlement of this claim was originally produced by the plaintiffs. In the notice to stockholders plaintiffs' attorneys summarized the claim and made the following statement:

> "Upon all the evidence plaintiffs' attorneys have concluded that the credit arrangement was fair and reasonable. Apart from the question whether a technical by-law violation might still be argued, plaintiffs' attorneys have concluded that these causes of action could not be sustained in the light of business considerations and the fact that there is no evidence that any director personally profited from the transaction."

In evaluating the prospects of success on this claim I assume without deciding that Section 9 of Chrysler's by-laws was violated by the fact that a number of "interested" directors were present and voted to approve the agreement. Does it follow that the directors involved are therefore liable for the amount expended by Chrysler for the availability of the credit? It is uncontradicted that Chrysler paid no more than the going rate for the commitment. Indeed, there is no "objective" evidence that the terms were unfair to Chrysler or that the participating directors were guilty of bad faith. The thrust of the Ezzes objection is that the interlocking directors, because of their conflict of interest, recklessly committed Chrysler to a credit commitment which it did not really need. I am of the opinion, however, that the evidence of record on this matter fully supports the view, even on the assumption that the defendants must bear the burden of proof, that the commitment was reasonably necessary for the purpose that it was intended to serve and that the need therefor was reviewed periodically and reaffirmed. Considering the background and experience of the members of Chrysler's board as well as the other evidence, I do not think the absence of written studies is indicative of a lack of diligence

on the part of the directors in approving the commitment or allowing it to continue. Thus, apart from the alleged by-law violation, I am satisfied that the defendants could successfully have vindicated their conduct.

What then is the legal effect of the violation of Section 9 of the By-Laws? Certainly such conduct gives just cause for apprehension, but it does not follow in my opinion that the defendants are therefore absolutely liable for the dollar amounts paid by Chrysler for the commitment. None of the defendant directors received any personal profit from the transaction, nor did Chrysler receive less than its "money's worth". It follows therefore that any sum these defendants are required to pay to Chrysler will be in the nature of punitive, as opposed to compensatory, damages.

There are instances where the court will impose such damages in order to vindicate a legislative or other public policy. Generally speaking, however, in the absence of fraud or bad faith, a court will not upset a transaction involving corporations having even a majority of directors in common where the transaction is shown to be fair. In the present case, less than a majority of the directors were associated with banks ultimately participating, and one cannot fairly say that undue influence was exerted as to the rest. I recognize that the utmost vigilance is required in a case such as this, but where a close scrutiny of the record fails to disclose any meaningful evidence of actual wrongdoing or damage to the corporation, the monetary worth of the claim is most dubious. I conclude from the foregoing that plaintiffs' attorneys were justified in stating that these causes of action could not be sustained.

I turn next to the objector's claim that the directors of Chrysler acted recklessly in purchasing a substantial mi-

nority interest in Simca prior to 1963. The objector does not contend that there was any conflict of interest involved in this transaction. Thus, in substance he is attacking a decision involving a business judgment on the part of the directors. I am satisfied from the record before the court that the evidence adduced in support of such claim is wholly inadequate to afford any hope of meeting the heavy legal burden imposed in this area.

Both Koenigsberg and Ezzes object to the proposed settlement with the defendant NAFI Corporation. NAFI was charged in the Dann complaint with having sold inferior textile materials to Chrysler at excessive prices and in greater quantities than were needed. The defendants K. T. Keller, Samuel Keller, and L. L. Colbert allegedly were "financially interested in and involved with NAFI Corporation" and caused Chrysler to make such purchases. NAFI denied the charges though it admitted that K. T. Keller had owned varying quantities of its common stock.

NAFI is not a defendant in the Gallo action though the charges are repeated in substance in the Gallo complaint.

Under the terms of the proposed settlement the claim against NAFI will be dismissed with prejudice. NAFI will not be required to pay a consideration in any form to Chrysler. No release will be given to NAFI.

The record shows that the stock owned by K. T. Keller in NAFI never exceeded 1.05% of the outstanding common stock of the corporation. Apart from that, the record is devoid of any evidence of wrongdoing on the part of this defendant in support of the alleged claims. The objector Ezzes charges that "the proponents willfully refrained from developing evidence sufficient to enable a proper evaluation of the NAFI cause of action." I am

satisfied that the charge of "willfulness" on the part of the proponents is wholly unfounded and that the evidence adduced by the plaintiffs warranted their representation that they could not succeed in establishing that Chrysler had suffered any damages. Ezzes suggests an area where further evidence might have been sought by plaintiffs with respect to this cause of action. There is no showing by the objector, however, that any of this evidence if produced would have added substance to the alleged claim.

Next, the objector Koenigsberg seems merely to suggest that since NAFI is giving no consideration to Chrysler, the settlement should not be approved as to it. In view of the fact that both the plaintiffs and Chrysler agreed that the charges are unfounded and the record does not indicate anything to the contrary, I will approve the proposed dismissal as to this defendant if the general settlement is approved.

Ezzes also claims that the plaintiffs wilfully failed to produce evidence in support of the claims involving the so-called Consolidation Coal and National Steel transactions. Plaintiffs' attorneys represented in the notice that they had no evidence of any improprieties in these transactions. In my opinion such representations are fully supported by the extensive record on these matters. The objector says that further evidence should have been sought, but here, as in the NAFI transaction, there is no showing that the additional proof would add substance to these claims. This is particularly true because of the evidence adduced before the Court.

The claims by the objector Ezzes that the salaries paid to Colbert and K. T. Keller constitute "gifts" are without substance. There is no evidence of wrongdoing in the negotiation of either of these contracts, and the "proof"

tendered in support of the charges of breach of contract offers meager hope of ultimate success on these claims.

One other claim needs mention here. The objector Koenigsberg urges that the claims against the defendants Minor and Colbert with regard to the so-called Taxi-Ad transaction should be dismissed without prejudice and that neither defendant should receive a release or be reimbursed for his expenses by Chrysler. The objector does not contend that a real promise of success exists with respect to these claims. He states only that since neither defendant is presently an officer or director of Chrysler, neither can be said to have offered anything to Chrysler for settlement. He contends, however, that a "prima facie case" exists against Colbert.

After reviewing the evidence on this matter, I am satisfied, in view of Minor's relatively insignificant role in Chrysler's affairs and the disclosures involved, that no reason presently exists for not disposing of this claim as part of the general settlement.

Having weighed the claims asserted by the objector Ezzes to have merit and the possible defenses, I conclude that the probability of success in litigating any of such claims is so remote as to entitle them to practically no consideration in evaluating the fairness of the terms of settlement. I turn then to the claims asserted by the plaintiffs herein. The only claim which the plaintiffs now contend has merit is that which relates to incentive compensation. Let us examine this claim.

The tenth Dann cause of action and the eighth Gallo cause of action as finally amended stated several "claims" relating to the present incentive compensation plan which was adopted by Chrysler's board and stockholders in 1956.

These complaints alleged that the adoption of the plan was invalid and that the payments which were permitted thereunder were excessive and unconscionable. The formula was said to be improper because incentive compensation was permitted to be paid before the shareholders had obtained a reasonable return on their invested capital and because loss years were not set off against years in which there were profits in determining the availability of incentive compensation. Furthermore, plaintiffs claimed generally that payments had been inflated by miscalculations in applying the formula and by changes in accounting practices and policies. Finally, plaintiffs urged that as a matter of law officers found to be guilty of breaches of fiduciary duty to the corporation were not entitled to receive any incentive compensation whatever.

In the stipulation of settlement plaintiffs' attorneys represented that they had investigated the various claims under these causes of action and had reached the conclusion that the only issue that might profitably be pursued concerned the "fairness" of the existing plan. In attempting to evaluate the substantiality of this claim, however, one is met at the outset by fact that plaintiffs or their attorneys have not further delineated the nature of the alleged "unfairness" purportedly found by them in the present plan.

Let us examine the present incentive compensation plan, plaintiff's claims with respect thereto which might reasonably raise an issue as to "fairness", and the proposed modification of such plan.

Under the existing (1956) formula, incentive compensation awards may be made only for those years when consolidated net earnings of the corporation and consoli-

dated subsidiaries (as reported in the annual report to the stockholders) *before* taxes on income and before provision for incentive compensation and interest on long-term debt of the corporation, exceed 7% of the shareholders' investment (capital, surplus and retained earnings) in the corporation and consolidated subsidiaries and long-term debt of the corporation. The total provision for awards in any year is limited to 5% of such excess. The 1956 formula does not contain any provision limiting the bonus fund in any year to the amount of dividends declared in such year, or any other dividend limitation.

The only issue as to the "fairness" of this plan which might reasonably be said to have been raised in the Dann complaint and which has not been conceded by the plaintiffs to be without merit is the claim that the present plan is wasteful, because it permits payments to be made in excess of what could be granted under the comparable incentive compensation plans of Chrysler's principal competitors. The Dann complaint asserts that the plan should permit payments only when the income of the corporation exceeds a reasonable return on the stockholders' investment, the present Chrysler plan requiring a "set aside" only of 7% of the stockholders' investment before taxes, which is the equivalent of about 3½% after taxes. Such payments are said to have been particularly wrongful under the circumstances, because Chrysler's position in the automotive industry has declined since 1956 while the incentive payments to Chrysler employees during that period have nonetheless been substantial. A similar charge was made in the Gallo complaint.

It can be fairly said I think that, generally speaking, both the Dann and Gallo complaints challenge the set-aside percentage in the present plan as "unfair" on the ground

that the return on the stockholders' investment is too small in relation to the amount of incentive compensation that can be awarded. In this sense "an issue as to the fairness of the existing plan", as stated by the proponents in the stipulation of settlement, can be said to remain in the case. This disposes of a suggested objection to the settlement that it is not "related" to any of the causes of action. Compare Manacher v. Reynolds Metals, (Del. Ch.), 165 A. 2d 741. I pass over for the time being the problem of evaluating the probability of success on the plaintiff's part if ultimately they were to litigate this issue.

The proposed plan, as modified in accordance with the terms of the settlement, provides that for the years 1963 through 1969, incentive compensation awards may be made only for those years when the sum of (1) consolidated net earnings of the corporation and consolidated subsidiaries (as reported in the annual report to the stockholders) *after* taxes in income, and (2) provision for incentive compensation, and (3) interest on long-term debt of the corporation, exceeds 5½% of the stockholders' investment (capital, surplus and retained earnings) in the corporation and consolidated subsidiaries and long-term debt of the corporation. The total provision for awards in any year is limited to the lesser of 12% of such excess or the aggregate amount of all dividends declared upon the common stock of the corporation during the year.

The basic changes brought about by the modification have been the conversion of what was previously a before-tax incentive plan into an after-tax plan, an increase[2] in

[2]The 7% stockholders set-aside under the 1956 formula relates to before-tax earnings, whereas the 5½% stockholders' set-aside under the 1963 formula relates to after-tax earnings. Consequently, as-

the set-aside (i.e., the return on the stockholders' investment before payment of any incentive compensation under the plan), and an increase[3] in the percentage of compensation to be awarded after deduction of the set-aside.

Thus, the 1963 formula requires a higher level of earnings before any award of incentive compensation may be made, by reason of the higher set-aside. Until the "cross-over point" is reached (i.e., the point at a still higher level of earnings where the amount of the bonus fund would be the same under both formulas), the higher set-aside under the 1963 formula would more than offset the higher rate of bonus so that a smaller bonus fund would be created under the new formula than under the 1956 formula. But once the level of earnings rises above the cross-over point a larger bonus fund will result under the 1963 formula than under the 1956 formula. However, under the 1963 formula, as a result of the increase in retained earnings, the set-aside in each succeeding year become greater than it would have been under the 1956 formula thereby requiring an even better earnings performance in each of these years to obtain the same bonus fund.[4]

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suming a 50% effective tax rate, on an after-tax basis the 7% set-aside under the 1956 formula would be equivalent to only 3½%, as compared with the 5½% set-aside under the 1963 formula. Conversely, on a before-tax basis, the 5½% set-aside under the 1963 formula would be equivalent to 11%, as compared with 7% under the 1956 formula.

[3]The bonus rate of 5% under the 1956 formula relates to before-tax earnings whereas the bonus rate of 12% under the 1963 formula relates to after-tax earnings. Assuming a 50% effective tax rate, on an after-tax basis, the 5% bonus rate under the 1956 formula would be equivalent to 10%, as compared with the 12% bonus rate under the 1963 formula. Conversely, on a before-tax basis, the 12% bonus rate under the 1963 formula would be equivalent to 6% as compared with 5% under the 1956 formula.

[4]The amicus computed that for the ten-year period 1953 through 1962, the total bonus fund would have been $3,748,713 less than it was, had the 1963 formula been applied.

To a certain extent then plaintiffs can fairly claim that they have achieved at least one of the objectives of their suit which was to increase the set aside and thereby increase the amount of income which must be earned by the corporation before equivalent amounts of incentive compensation can be paid. That is not to say of course that plaintiffs' claim as to "unfairness" in the present plan is well founded. Indeed, considering the facts of record now before the court, I think the probability was small that ultimate success could have been achieved on this issue. Because of this, however, the plaintiffs, defendants, and objectors have taken radically different approaches in attempting to sustain or attack the validity of the proposed settlement.

The plaintiffs vigorously urge that the proposed modication plus the changes in management, etc., which were mentioned before, are "beneficial" to Chrysler and accomplish the objectives of the lawsuit. Thus, the plaintiffs have attempted to formulate the settlement within the traditional framework of a quid pro quo offered by the defendants in exchange for releases from further liability.

The defendants, including Chrysler, ignore the traditional approach. They deny there is merit to any of the claims, and while they believe that the modified plan will be advantageous to Chrysler and its stockholders, they do not believe that it remedies any supposed defect in the old plan. They agree that apart from the settlement, Chrysler's management had not previously given any consideration to a modification of the existing bonus plan.

The defendants urge that regardless of the extent to which the modification can be said to "benefit" Chrysler, the court should approve the settlement as fair and reasonable.

since the expense of continuing the litigations will far outstrip any potential recovery.

The objectors, except Ezzes[5], agree with the defendants that all the claims are without merit and should be disposed of. They disagree, however, that the lawsuit may properly be settled on the basis proposed by the plaintiffs and defendants. The objectors' contentions are basically reducible to two propositions. First, it is said, the proposed modification offers no demonstrable benefit of any kind to Chrysler though, if approved, it will commit Chrysler to a substantial change in its compensation plan. Secondly, as a practical matter, approval of the modification by the court will create for Chrysler's employees, a number of whom are defendants herein, a larger fund for the year 1963 than would be available under the existing plan. The objectors say that reasonably viewed, the defendants must have been aware of such fact when they agreed to the settlement.

The objectors suggest that plaintiffs' attorneys supported the proposed modification as part of the settlement not because it would remedy some arguable defect in the existing compensation plan, but because it would give color to their claim for an allowance of attorneys' fees. The defendants were willing to accept these terms, it is said, because they were required to surrender nothing in return for their releases. Moreover, since Chrysler's earnings for the fiscal year ending in 1963 promise to exceed the "crossover point", the bonus fund will be larger than if the 1956 formula were still in effect. For all these reasons the objec-

[5]The Ezzes objections are considered above and have been rejected by the court. Ezzes, however, also joins in the objections here stated, viz., that the proposed modification is not a proper or adequate consideration for settling the lawsuit.

tors urge that the proposed settlement be rejected as unfair and unreasonable.

Having considered the nature of the claims and the possible defenses, I agree with the basic position of the defendants and objectors that there is little, if anything, to the causes of action asserted by the plaintiffs. Obviously in such a case settlement of the litigation is in the best interest of the corporation and in fact is much to be desired from the point of view of all the interested parties. The problem I am confronted with here, however, with due regard for the court's obligation to exercise its judgment with respect to the fairness of the settlement, lies in determining what terms may properly be accepted by the court.

Common sense it seems to me would dictate that where the hope of recovery on the part of the plaintiffs, and thus on the part of the corporation, is small, little can be demanded from the defendants by way of settlement. Certainly this is the case here.

The objectors say, however, that no settlement can be approved unless there is technical legal merit to the claims asserted in the complaint and consideration of some formal nature is offered by the defendants in exchange for their releases. Thus, they urge that if the complaints lack legal merit, they should be dismissed with prejudice. They should not be permitted to become the basis for a supposed settlement wherein the defendants offer nothing because the claims asserted against them have virtually no value.

Assuming without deciding that the rule urged by the objectors might be applicable in a case where the court could say with complete confidence that the claims lack "technical legal merit", nonetheless, it is clear that this is

not such a case. There is no doubt that in the technical sense many of the asserted claims would survive a motion to dismiss, assuming the defendants chose to press such a motion. Thus, if the court were to reject the proposed settlement, the parties would merely be in the position of having to continue the litigation. It is just this situation which, with some justification on either side, both plaintiffs and defendants hope to avoid. Under the circumstances, I think that the court need only determine whether the terms are fair when measured against the probability of recovery on the asserted claims.

The objectors next contend, however, for a wide variety of reasons, that the court ought not accept a modification of the incentive compensation plan as the basis for settlement. First, apart from the fact that the modified plan is likely to give the individual defendants a greater return than the old plan for the year 1963, the objectors contend that the proposed plan cannot be shown to be an improvement over the old plan and therefore is not a "valuable consideration" offered by the defendants for settlement. The basis for this contention is that no one can adequately foresee what the future holds for Chrysler in the way of profits. The objectors purport to show that it is probable that Chrysler will operate in the future at or above the cross-over point and therefore that the payments to Chrysler employees will probably exceed what they would have been under the old plan. This conclusion, however, rests on the selective use of available financial data with which in my opinion one may either agree or disagree. The objectors say, however, that in any case the modification must be rejected because the proponents have the burden of showing that the modification will result in smaller incentive payments or otherwise provide some de-

monstrable benefit to the corporation and this they cannot do.

It is fair to say I think that no one can predict with certainty what degree of success Chrysler will have in its operations in future years. Although Chrysler enjoyed a series of profitable years from 1950 to 1957, it showed a loss in 1958 and 1959. No one will deny, moreover, that the earnings of a major business corporation engaged in the production of automobiles are subject to a number of variables, some of which have little, if any, relationship to the amount of effort exerted by management. To that extent of course the objectors are justified in asserting that the proponents cannot "prove" that incentive payments will be smaller in any particular year in the future. All that may be said in the final analysis is that under the proposed modification earnings will have to be higher, up to the cross-over point, in order for payments to be the same as they would been under the old plan but once that point is exceeded, payments can be larger.

Does the fact that there is no assurance that the fund and thus the probable payments in any particular year will be smaller under the proposed formula than under the existing formula vitiate the modification of the incentive compensation plan as the basis for settlement? Clearly there are dangers involved in this type of settlement where the only "consideration" offered by the defendants is the taking of some corporate action which not only involves no immediate detriment to the "charged" defendants or "assured" benefit to the corporation but also may in fact ultimately result in larger compensation payments to the defendants, among others. That is only to say, however, that each such case must be considered on its own merits. The

objection made is not so much that the defendants are not giving a sufficient "consideration" but that they are purporting to give a consideration when in fact they are giving no consideration at all. The objectors state that they would prefer the actions to be dismissed rather than settled on the proposed basis. Since a refusal to approve the settlement cannot be equated with a dismissal of the actions, the objection here seems clearly to be related to plaintiffs' claims for an allowance of attorneys' fees rather than opposition to the termination of the pending litigation.

I am satisfied that as a practical matter settlement on the basis of the proposed modification is fair and reasonable subject to the limitation hereinafter imposed. Rejection of the settlement generally would clearly not be in the interest of Chrysler or its stockholders. While, as I have indicated before, there can be substantial disagreement as to whether the proposed change in the incentive compensation plan is an "improvement", there is no substantial showing that it will be detrimental to Chrysler to the extent that this issue may be said to be poised in the balance. I think that the overwhelming approval of the modification by Chrysler stockholders with the knowledge that they were in effect approving the settlement constitutes a "plus" for the approval of the settlement.

Because much is made of it, I next consider the additional contention of the Dann plaintiffs that the "change" in Chrysler's management which has presumably occurred is itself sufficient consideration for settlement of the lawsuits. The Dann plaintiffs charged in their complaint that certain directors, officers, and employees of Chrysler were guilty of gross mismanagement, and they sought, inter

alia, the appointment of a receiver for Chrysler. The Dann plaintiffs contend that a major objective of this litigation has been to effect a change in Chrysler's management. They claim that the present lawsuit coupled with Dann's earlier activities is substantially responsible for such change or changes as have occurred in Chrysler's management.

Assuming without deciding that Dann's activities both before and after the filing of the complaint produced what he now describes as a "change in management", how, one asks, does that fact bear on the issue as to the fairness of the proposed settlement?

The defendants deny that any changes or improvements in Chrysler which may have occurred since the commencement of the plaintiffs' activities are attributable to the plaintiffs. It is certain, in any event, that the so-called change of management is not a "benefit" tendered to Chrysler by the defendants as a term of the settlement.

As I view the matter, it makes little difference on the issue as to the fairness of the settlement whether plaintiffs are credited with the presumed change in management or whether such changes are in fact beneficial to Chrysler. The paramount factor, as was noted before at some length, is that Chrysler and its stockholders have little to gain from a continuation of these litigations. Even if I were to conclude that these changes of personnel are not attributable to the plaintiffs, it could hardly be urged that the court should therefore withhold its approval of the settlement.

The objectors offer certain other reasons why the settlement on the proposed basis should be rejected. First, they say that modification of the incentive compensation plan could have been undertaken by the directors and

stockholders apart from settlement if the modification were thought worthwhile. This is of course true, but it does not follow that the old plan was improper. Indeed, the record would support a contrary conclusion. This being so the new plan and tender thereof as a basis for settlement cannot be evaluated as merely the result of their having performed their duty.

The objectors next say, however, that stockholder approval should be disregarded here because the stockholders may have felt that the modified plan should be adopted not because it is meritorious in and of itself, but because it was in the interest of the corporation to terminate the litigations. Assuming that the psychological motivation of the stockholders was as the objectors suggest, nonetheless I do not think their objection is of decisive significance. After all, the most that may be said is that the stockholders were called upon to make a business judgment weighing the desirability of continuing the litigations against the supposed merits of the modified plan. Their approval is at least some evidence that the terms of the proposed settlement are fair. To this may be added the fact that the raising of the so-called cross-over point should certainly in the long run result in an increase in the stockholders' equity.

Finally a point is made that the tendered plan is incompatible with the legal principle found in Nadler v. Bethlehem Steel Corp., 38 Del. Ch. 427, 154 A. 2d 146, and Duane v. Menzies, 37 Del. Ch. 416, 144 A. 2d 229 to the effect that the tendered terms of settlement must be sufficiently definite and beneficial to be capable of present valuation at least in a comparative sense. First of all, the approval of this settlement will not constitute a judicial imprimatur of its future operation. Indeed, the court in

the Nadler case later approved a settlement after it was made clear that its future operation was not being approved. While it is true that there is no assurance that during the "term" of this plan there will be a monetary "saving" to the corporation, the fact is that business-wise it should benefit the corporation. Therefore, considering its inherent limitations and the limited qualifications hereinafter imposed, I do not believe that the Plan runs afoul of either the Nadler or the Menzies cases.

I therefore conclude that in the application of the governing standards this settlement should be approved with one qualification. It is clear that the directors "bargained" for this settlement in the context of a profit picture for Chrysler that practically assured the directors that the "new" plan would produce a substantially greater fund than would the old plan for 1963. Thus, even with due allowance for the fact that the future operation under the plan is an "unknown", I do not believe that it is appropriate for the director defendants who are beneficiaries under the plan to receive the fruits of the new plan for 1963. I will therefore approve the terms of settlement on the condition that the director defendants who are beneficiaries under the plan agree that as to the year 1963 they will derive no added financial reward solely as a result of the modification. If they so agree I will expect counsel to suggest mechanics by which such a result can be achieved. If counsel cannot agree they may submit suggested alternatives by a fixed date.

One further matter of substance requires attention. Under a separate arrangement Chrysler has agreed, if the present settlement is approved, to pay a $20,000 fee to

Dann's attorney in the libel action in the Superior Court. The Sandler objectors say that this payment is an "improper preference" to Dann over other stockholders and therefore should be disapproved by the court.

The testimony disclosed that at least some of the $20,000 payment is justified by Chrysler on the basis that it represents, in part, payment for legal services rendered the Dann plaintiffs in this litigation by the attorney involved. The balance is presumably justified on the basis of a business-judgment settlement by Chrysler of the libel action which was complicated for Chrysler by a contemplated counterclaim by Dann for damages based on alleged abuse of process.

Preliminarily, the court is not asked to "approve" the $20,000 payment. Thus, contrary to the request of the Sandler objectors, it cannot "disapprove" the payment as such. As a practical matter, all the court can do at this stage is disapprove the entire settlement on the ground that the intended payment renders the entire settlement unfair. I note, however, that the Sandler objectors do not urge that the settlement be disapproved on this score. They merely ask that the court not permit this payment.

In discharging my duty here, I have considered this dubious fee arrangement a negative factor in arriving at my judgment concerning the fairness of the terms of settlement. However, I do not consider it a sufficient basis for refusing such approval. If I felt that the payment were a sham or device to provide an out of court "pay-off" to obtain a settlement which ignored the interest of the stockholders generally, I would not hesitate to withhold approval of the settlement. The record, however, does not

warrant such a conclusion. Moreover, the Gallo plaintiffs and their attorneys, who helped negotiate this settlement, did not participate in any of the negotiations surrounding the disposition of the libel action. Thus, I do not think the fairness of the settlement herein is in fact impugned by the agreement to pay a fee to Dann's separate counsel.

However, I think it apparent that the payment of the $20,000 fee is, euphemistically speaking, intimately connected with the settlement of the derivative actions. Thus, to the extent that any of the intended fee represents payment for services allegedly rendered in connection with these actions, the effect of the arrangement would be to circumvent the powers generally exercised by this court in supervising such payments.

Thus, while the settlement itself ought not be disapproved as "unfair" because of the proposed payment, I am of the opinion that disposition of this fee matter should await the hearing on the question of plaintiffs' fees generally. Perhaps Dann and Chrysler will agree that payment of the stipulated sum or any part thereof will abide a decision by this court as to its propriety when judged by controlling Chancery standards. If not, then the matter will be considered in determining whether and to what extent Dann is entitled to reimbursement for counsel fees herein.

Other assorted matters not herein mentioned have been considered. They have been determined either to be consistent with the conclusions herein reached or irrelevant thereto.

Present order on notice.

On Motions for Reargument

Motions for reargument have been filed by the Ezzes, Koenigsberg, and Sandler objectors. They say the settlement should be approved only on the condition that the new incentive compensation plan takes effect as to all beneficiaries on January 1, 1964 rather than January 1, 1963, as provided in the proposed settlement. The basis for their contention is found in this court's prior opinion. There the court said that the settlement would be approved on the condition that the director defendants who are beneficiaries under the plan agree that as to 1963 they will receive no additional financial reward solely as a result of the modification. This was done because it was found "that the directors 'bargained' for this settlement in the context of a profit picture for Chrysler that practically assured the directors that the 'new' plan would produce a substantially greater fund than would the old plan for 1963".

The objectors in effect say that there is no reason why any beneficiaries of the plan, not merely the director defendants, should benefit in 1963 when the financial picture for that year was as indicated, particularly since the new plan was tendered as a settlement device. In their answer to the objectors' motion, certain defendants say that the court erred in finding that the directors bargained for this settlement in the context above quoted. Thus, they say the condition was imposed on the basis of an erroneous premise and it would therefore be compounding the error to extend the condition to all the beneficiaries of the plan. They say that only one director participated in the negotiations and that he largely settled the terms as early as February 1962.

The problem under consideration must be evaluated in the light of the function the court was called upon to perform, viz., to pass upon the fairness of the settlement. Parenthetically, when the court was writing the original opinion, it considered the possibility of imposing the condition now suggested by the objectors.

Because the changed incentive compensation plan, rather than any "consideration" flowing from the real defendants, was tendered as the basis for the settlement, the court felt compelled to evaluate carefully the result of the change particularly insofar as the director defendants were concerned. It was reasonably clear to me from the record that there had been general public acceptance of Chrysler's cars for the model year 1963. This was evident not only from the earnings picture for the last quarter of 1962 but from the figures for most of the first quarter of 1963. These matters plus the general financial prospects for Chrysler were of course known when Chrysler agreed to the settlement in final form in late February 1963 and again when the board confirmed the settlement in late March 1963. The knowledge and expectations of the defendant directors concerning Chrysler obviously put them in the position where they at least for the year 1963 could obtain a complete release from the litigation not only without paying anything personally but by finally approving a revised plan which would probably assure them even greater compensation payments for 1963.

In my prior opinion I used "bargained" in relation to the time the matter ripened for judicial consideration. Perhaps "bargained" was an unhappy choice of language. It might have been better to say "finalized". In any event the settlement cannot be justified by the directors by refusing to

consider what the true situation was when the matter was finally ripe for submission to the court. They had a continuing duty to the stockholders to agree only to what was then fair.

I also note that the defendants' answer to the motion emphasizes that the new plan was negotiated by one director and that the director defendants subject to the condition constitute a minority of the entire board of directors. From these facts they seem to be suggesting that the imposition of the condition is either unfair or is based on actions which were not under their control. I need not consider the legal niceties of this problem in the context of mere adversary proceedings. As noted, the directors approved a settlement in the light of a profit picture which resulted in benefits to certain members of the board. Minority or not, the result was reasonably certain to provide some of its members who were defendants with a benefit at least for 1963 which was greater than they would have received had the lawsuits been litigated and decided in their favor. In the face of the total picture presented, particularly in view of defendants' evaluation of the merits of the lawsuits, this was a benefit which I felt in fairness should be removed.

Thus, the court does not feel that the premise in the prior opinion for imposing the condition upon the director defendants is unwarranted. Nevertheless, this does not aid the objectors here because the non-director beneficiaries of the plan were not personally involved in approving the change and making it applicable to 1963. Also, not being defendants, they were not receiving any benefit for the release of corporate causes of action against them. Moreover, in the long view of this plan one cannot say with

objective assurance whether it will or will not be more beneficial to the participants. Indeed, it may be less so. Thus, the court adheres to the limited condition imposed in the prior opinion.

The Sandler objectors also argue that the court should adopt the January 1, 1964 date generally, because it now knows the effect of the new plan for the year 1963. Passing over the element of hindsight, I believe this point overlooks the fact, noted above, that we are dealing with a seven year plan. The fairness test cannot be applied by looking at the results of only one year. The imposition of the condition on the defendant directors was imposed for reasons special to them.

Other grounds for reargument either are adequately treated in the prior opinion or do not call for any change therein. Thus, the motions for reargument are denied.

Present order on notice.